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STATE LAW LIMITATIONS ON THE USE OF INITIATIVES AND REFERENDA IN CONNECTION WITH ZONING AMENDMENTS

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Public willingness to regulate land uses often exceeds public confidence in local governments as agencies for such regulation.¹ Local politicians have

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1. For an interesting discussion of public attitudes toward land development, see *THE USE OF LAND* 33-73 (W. Reilly ed. 1973). This discussion describes a "new mood" of skepticism about the benefits of unrestrained growth. *Id.* at 36. One conclusion offered is that "citizens are more clear about what they don't want than what they do want." *Id.* at 41.

Land use regulation is not only a matter of considerable public concern, but is also one in which the public considers itself to have a fairly high degree of expertise. Richard Babcock, a knowledgeable and perceptive land use attorney, has observed that:

The layman remains king in land-use matters because he has not feared to grasp the nettle of land-use regulation. In matters cosmic like unemployment and the disposal of metropolitan sanitary and industrial waste, the layman as public decision-maker has a sense of inadequacy or boredom. Not so, however, on the question of who or what comes in on the lot next door. . . . Imagine the wholesale indifference were you to poll . . . luncheon guests on their attitude toward a proposed bill to reform the state criminal laws or the banking code. . . . Try the same test, however, with a proposal to revise drastically our laws on the control over use of private land and half of the guests would come off their seats. Not only does this public law have a greater direct impact upon the layman's social and economic security, but he is certain that he knows what is good for him as well as any professional.

R. BABCOCK, *THE ZONING GAME* 19-20 (1966).

Coupled with this high degree of public interest are good reasons for public distrust of local government decisionmaking:

An understaffed (or nonexistent) planning department, an impecunious applicant, and some threatened neighbors, all presenting views to public officials who probably must squeeze their unpaid public service into their spare time, do not add up to a decision-making process that inspires confidence. And added to that are the common accusations of incompetence, conflict of interest, and even corruption among the decision-makers.

THE USE OF LAND, *supra* at 191.

In too many localities, though, neither the procedures for determining land use nor the individuals making the decisions have the public's confidence. In any number of localities, citizens suspect that the people making regulatory decisions are thinking more about themselves and their cronies than about the general welfare. . . . Unfor-

demonstrated parochialism,² favoritism,³ stupidity,⁴ and greed⁵ in regulating land development. The informality of local zoning decisionmaking often results in the appearance, if not the reality, of irresponsible government. In recent years planners have suggested devices for "citizen participation" to improve the quality of official decisionmaking.⁶ The most direct forms of citizen participation in zoning are not, however, the product of modern planning, but are legacies from the populism of the last century: the initiative and referendum.⁷ The initiative and referendum permit interested voters to engage in direct legislation, bypassing or overruling their elected local officials.⁸

tunately, the informality that is a virtue of local government can foster these suspicions.

Id. at 213-14.

2. The tendency toward parochialism has been called the "dark side of municipal land use regulation." *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 193, 336 A.2d 713, 735 (Pashman, J., concurring), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975). *See also* *National Land & Inv. Co. v. Easttown Township Bd. of Adjustment*, 419 Pa. 504, 215 A.2d 597 (1965).

3. *See, e.g.*, *Fleming v. City of Tacoma*, 81 Wash. 2d 292, 502 P.2d 327 (1972).

4. *But see* THE USE OF LAND, *supra* note 1, at 183-92 (points out the difficulty of the choices facing local zoning officials). *See generally* R. BABCOCK, *supra* note 1, at 19-40 (discusses the capability of laymen as public decisionmakers and is especially critical of the lay planning commission).

5. *See, e.g.*, Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 701-02 (1973) (citing instances of alleged corruption).

6. *See, e.g.*, D. GODSCHALK, PARTICIPATION, PLANNING, AND EXCHANGE IN OLD AND NEW COMMUNITIES: A COMPARATIVE PARADIGM 152-59 (1972); Comment, *Public Participation in Local Land-Use Planning: Concepts, Mechanisms, State Guidelines and the Coastal Area Management Act*, 53 N.C.L. REV. 975 (1975); Comment, *Michigan's Citizen Participation Statute*, 1970 URB. L. ANN. 231.

7. *See* Comment, *The Initiative and Referendum's Use in Zoning*, 64 CALIF. L. REV. 74, 74 n.2 (1976); Note, *The California Initiative Process: A Suggestion for Reform*, 48 S. CAL. L. REV. 922, 923 & n.5, 924 (1975).

8. Generally, exercise of the local initiative power requires that a certain percentage of the voters of the municipality sign and submit to the city governing board a petition accompanied by the ordinance drafted by the initiative's sponsors. City government officials are responsible for determining the legal sufficiency of the petition, including the question of the number and validity of the signatures. In most instances the city council has the option of either enacting the proposed legislation or submitting the ordinance to a vote at a special or the next general election. The ordinance becomes law if it receives a majority of the votes cast at the election. Some statutes provide for special steps to be taken by the initiative sponsors to inform the voters about the nature of the proposal. *See, e.g.*, CAL. ELEC. CODE §§ 4000-4021 (West Cum. Supp. 1975-1976) (California local initiative procedures).

The local referendum power is exercised pursuant to statutes providing that ordinances enacted by a city governing body do not become effective for a stated period, usually 30 days. During this period, a required percentage of the local electorate may submit a petition calling for the repeal by the governing body of the newly enacted ordinance, or, failing that, submission of the ordinance to a popular vote at a special or general election. Submission of a valid petition stays the effective date of the ordinance. The ordinance becomes effective only if it

In the last decade several lawsuits have challenged the use of direct legislation devices in making land use decisions.⁹ Distrust of local officials and the desire to preserve a certain quality of life have motivated some voting publics to use the initiative or the referendum to solve or forestall the economic, social, or environmental problems associated with shifts in population from the farm to the city and from the city to the suburbs.¹⁰ Not surprisingly, those who favor continued urban or suburban growth—land developers, advocates for the urban poor, and business-oriented local politicians—have challenged the use of the initiative and referendum in the zoning amendment process.

receives the required percentage of the votes cast in the election. *See, e.g.*, CAL. ELEC. CODE §§ 4050-4061 (West Cum. Supp. 1975-1976) (California local referendum procedures).

9. *See, e.g.*, *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, *on remand*, 356 N.E.2d 499 (1976) (per curiam) (referendum on zoning amendment to permit apartment project); *James v. Valtierra*, 402 U.S. 137 (1971) (referendum to approve or disapprove low-income housing projects); *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976) (zoning amendment to "slow" the development process enacted by initiative); *San Diego Bldg. Contractors Ass'n v. City Council*, 13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146 (1974) (zoning amendment to impose building height restriction adopted by initiative), *appeal dismissed*, 427 U.S. 901 (1976).

10. The fact that public opinion on such matters is more readily identified and coalesced around negative planning ideas, *see note 1 supra*, and the fact that the initiative and referendum procedures require expenditures of time, energy, money, and verbal facility, *see note 17 infra*, make it fair to say that, in the context of land use, the direct legislation devices are most effectively used by residents of relatively homogeneous middle-class communities to prevent unwanted development—especially development that portends increased size or heterogeneity of population. The nature of the litigated disputes tends to confirm this conclusion. *See, e.g.*, cases cited note 9 *supra*. *See generally* Note, *The Proper Use of Referenda in Rezoning*, 29 STAN. L. REV. 819, 825 n.35 (1977) [hereinafter cited as *Referenda in Rezoning*].

This characteristic of the problem is not often mentioned in the state court opinions. It is arguable, however, that one of the reasons for refusing to permit direct legislation in making zoning decisions is that plebiscite decisionmaking is potentially more parochial than ordinary city council lawmaking. Through the normal processes, "outsiders" are entitled to and do get a hearing before city governing bodies either directly, *see, e.g.*, *Scott v. City of Indian Wells*, 6 Cal. 3d 541, 492 P.2d 1137, 99 Cal. Rptr. 745 (1972), through a requirement that extramural needs be considered, *see, e.g.*, *Borough of Cresskill v. Borough of Dumont*, 15 N. J. 238, 104 A.2d 441 (1954); *Oakwood at Madison, Inc. v. Township of Madison*, 128 N. J. Super. 438, 320 A.2d 223 (1974), *aff'd as modified*, 72 N.J. 481, 371 A.2d 1192 (1977), or through the voices of the land development community, which assertedly has great influence with local officials.

Direct legislation devices can also have a dampening effect on land development generally. An excellent student note suggests that the referendum has "pragmatic appeal" to advocates of "no-growth" land development policies. *See Referenda in Rezoning, supra* at 824. The additional level of decisionmaking imposed by the referendum is thought to make rejection of permissive zoning amendments more likely. *Id.* at 824-25. The delay, costs, and uncertainty created by the referendum also decrease the landowners' incentives to propose new developments at all. *Id.* at 825, 840-42. These negative effects will obviously be even greater where the referendum procedure is mandatory rather than optional. *See, e.g.*, *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976).

In resolving these disputes, courts have employed a variety of approaches. Some courts have disallowed direct legislation in the zoning amendment context because such procedures conflict with zoning enabling legislation,¹¹ violate due process rights of notice and hearing,¹² or invade an area of "administrative" decisionmaking.¹³ In important recent cases, however, courts have held that the use of the initiative to enact zoning amendments is not invalid because of its inconsistency with the procedural requirements of zoning enabling acts,¹⁴ and that the initiative and referendum do not violate due process.¹⁵

This Article will critically analyze the doctrines of state law that have been used to decide whether one or both of the direct legislation devices are appropriately applied to the zoning amendment process. The discussion will identify characteristics of the zoning amendment process that apparently have caused courts to reject the use of direct legislation devices in that context, and will consider which types of zoning amendment decisions are appropriately subject to legislation consistent with a policy of promoting intelligent, fair, and responsive decisionmaking.¹⁶

11. See, e.g., *Hurst v. City of Burlingame*, 207 Cal. 134, 140, 277 P. 308, 311 (1929). *Hurst* was overruled by *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 18 Cal. 3d 582, 596, 557 P.2d 473, 480, 135 Cal. Rptr. 41, 48 (1976).

12. See, e.g., *Hurst v. City of Burlingame*, 207 Cal. at 141, 277 P. at 311; *Forest City Enterprises, Inc. v. City of Eastlake*, 41 Ohio St. 2d 187, 324 N.E.2d 740 (1975), *rev'd*, 426 U.S. 668, *on remand*, 356 N.E.2d 499 (1976) (*per curiam*).

13. See, e.g., *West v. City of Portage*, 392 Mich. 458, 472, 221 N.W.2d 303, 310 (1974) (Levin, J.).

14. See, e.g., *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 18 Cal. 3d 582, 590, 557 P.2d 473, 476, 135 Cal. Rptr. 41, 44 (1976).

15. See, e.g., *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 679 (1976); *San Diego Bldg. Contractors Ass'n v. City Council*, 13 Cal. 3d 205, 217-18, 529 P.2d 570, 577-78, 118 Cal. Rptr. 146, 153-54 (1974), *appeal dismissed*, 427 U.S. 901 (1976).

16. This Article is not primarily concerned with the parameters or ramifications of the due process holdings of *Eastlake* and *San Diego*. These opinions do not establish a due process entitlement to the use of direct legislation, but hold only that persons adversely affected by direct legislation in zoning have not been denied due process in the somewhat unusual contexts of those cases.

In *Eastlake*, the United States Supreme Court held that a city charter provision requiring proposed land use changes to be ratified by referendum did not violate the due process rights of a landowner who applied for a zoning change. See 426 U.S. at 670-72. The precedential value of *Eastlake* may well be limited, however. The majority's opinion was based on the state court's conclusion that the enactment of zoning provisions is a legislative function. Justice Stevens' dissent pointed out, however, that where referendum procedures are applied to zoning amendments affecting specific parcels—as arguably was the case in *Eastlake*—rather than to comprehensive zoning ordinances, state courts often hold such use of the referendum to be inappropriate because the decision actually is administrative rather than legislative. *Id.* at 690-92. See generally notes 43-44, 125-29 and accompanying text *infra*. Assuming *arguendo* that the zoning decision was administrative, Justice Stevens argued that the *Eastlake* conflict would

I. THE ZONING AMENDMENT PROCESS— A PRELIMINARY OVERVIEW

Evaluation of the doctrines responsive to challenges to zoning amendment initiatives and referenda requires an understanding of the zoning amendment process. It may thus be useful to discuss some of the essential characteristics of that process as it is practiced.

The enactment of a zoning amendment is formally a legislative act performed by the elected local officials comprising the city council.¹⁷ The local power to enact and amend zoning ordinances is derived from state enabling legislation;¹⁸ such legislation generally limits the grant of zoning power by imposing a series of procedural and substantive requirements. Many enabling acts require, for example, that before a zoning ordinance can be enacted or amended, the proposal must be reviewed by the planning board.¹⁹ The planning boards often are required to hold public hearings in the course of their deliberations.²⁰ Under some legislation, an unfavorable

simply be between the property owner and his neighbors and would not concern the general public interest in preserving the city's basic zoning plan. 426 U.S. at 693. As such, Justice Stevens thought it "essential that the private property owner be given a fair opportunity to have his claim determined on its merits." *Id.* at 693-94. In view of the growing tendency of state courts to treat rezonings as administrative, *see* notes 125-60 and accompanying text *infra*, and the explosion of procedural due process decisions by the Supreme Court following *Goldberg v. Kelly*, 397 U.S. 254 (1970), a strong argument can be made that *Eastlake* does not dispose of the procedural due process problems inherent in zoning referenda. In particular, if the rezoning involves a specific parcel of land, it should be possible to argue successfully that a referendum does not adequately protect the due process rights of the affected landowner. *See also* note 159 *infra*.

San Diego involved a procedural due process attack on an initiative that imposed a building height restriction upon an area of the city designated as the coastal zone. The facts of the case present a very difficult judgment whether to label the decisionmaking "adjudicative," as to which a notice and hearing requirement would be applicable, or "legislative." *See generally* notes 76-78 and accompanying text *infra*. If an initiative imposed zoning restrictions on a specific parcel of land smaller than San Diego's coastal zone, however, the above discussion of *Eastlake* makes clear that state courts, as well as the United States Supreme Court, might well hold that such an initiative would violate the due process rights of the affected landowner.

Recent commentary presents quite useful discussions of the *Eastlake* and *San Diego* cases. *See, e.g.*, Comment, *supra* note 7, at 85-89 (1976); Note, *Zoning—Adjudication by Labels: Referendum Rezoning and Due Process*, 55 N.C.L. REV. 517 (1977); *Referenda in Rezoning*, *supra* note 10, at 825-31.

17. *See* D. MANDELKER, *THE ZONING DILEMMA* 64, 66 (1971).

18. *See, e.g.*, CAL. GOV'T CODE §§ 65800-65912 (West 1966).

19. *See, e.g., id.* §§ 65853, 65857 (West Cum. Supp. 1975-1976); N.J. STAT. ANN. § 40:55D-64 (West Cum. Supp. 1976); OHIO REV. CODE ANN. § 713.10 (Page 1976).

20. *See, e.g.*, CAL. GOV'T CODE § 65854 (West Cum. Supp. 1975-1976); N.Y. GEN. CITY LAW § 37 (McKinney 1968).

judgment by the planning board triggers a requirement that the proposal be enacted, if at all, by an extraordinary majority of the city council.²¹

The city council itself generally is required to hold public hearings—not merely open meetings—when considering a zoning ordinance enactment or amendment.²² Moreover, when presented with a petition opposing the amendment signed by a designated number of landowners or residents near the site to be affected, the city council may be required to act only by an extraordinary majority.²³

In addition to these procedural requirements, zoning enabling acts typically contain substantive standards that implicitly require certain types of deliberations by the council. The most familiar of these requirements is that enactments be “in accordance with a comprehensive plan.”²⁴ While its precise meaning is unclear, the “comprehensive plan” requirement symbolizes the central idea that zoning regimes ought to be based on consideration of a wide variety of public concerns.²⁵

The amendment process itself reflects the fact that community planning is an ongoing process in which the zoning ordinance, one of several tools for the implementation of a community plan, must be altered to meet changing needs and perceptions. Ideally, the combined experience of the planning board, the professional city planning staff, and the city council should provide historical perspective and realistic vision to ensure that the ongoing land use regulation process is reasonably related to current as well as future community needs.²⁶

21. See, e.g., OHIO REV. CODE ANN. § 713.12 (Page 1976). See also *id.* § 713.02.

22. See, e.g., CAL. GOV'T CODE § 65856 (West 1966); N.Y. GEN. CITY LAW § 83 (McKinney 1968).

23. See, e.g., N.J. STAT. ANN. § 40:55D-63 (West Cum. Supp. 1976); N.Y. GEN. CITY LAW § 83 (McKinney 1968).

24. Haar, “*In Accordance With a Comprehensive Plan*,” 68 HARV. L. REV. 1154 (1955); see, e.g., CAL. GOV'T CODE § 65860 (West Cum. Supp. 1975-1976); N.J. STAT. ANN. § 40:55D-62 (West Cum. Supp. 1976); R.I. GEN. LAWS § 45-24-3 (1956); WASH. REV. CODE ANN. § 35.63.090 (1965).

25. See 1 N. WILLIAMS, AMERICAN PLANNING LAW—LAND USE AND THE POLICE POWER §§ 26.10-20 (1974). See generally *id.* §§ 20.01-23; Haar, *supra* note 24.

State courts in recent years have required local decisionmakers to consider a wide range of community concerns in making zoning decisions. See, e.g., Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975); Oakwood at Madison, Inc. v. Township of Madison, 128 N.J. Super. 438, 320 A.2d 223 (1974), *aff'd as modified*, 72 N.J. 481, 371 A.2d 1192 (1977); Girsh Appeal, 437 Pa. 237, 263 A.2d 395 (1970).

Similar requirements have been imposed by statute. See, e.g., N.J. STAT. ANN. § 40:55D-2 (West Cum. Supp. 1976).

26. See *Referenda in Rezoning*, *supra* note 10, at 842-44.

The idealized theory stated above is out of touch with much of the reality of zoning amendment practice. The theory considers zoning ordinance enactment and amendment to be legislative acts. It is common to think of legislation as the establishment of rules of prospective application to an open—and usually large—class of potentially affected persons. Zoning amendment practice differs from this model, however, in two important respects.

First, by the nature of the subject matter itself, the zoning ordinance can have an immediate and significant economic impact that is felt primarily, if not exclusively, at the time of enactment by those who own the affected land. Zoning amendments that expand or restrict development rights invariably involve a transfer of value, which will be referred to here as a welfare transfer. When Blackacre is rezoned from a residential to an industrial classification, its value is enhanced. At the same time, the value of neighboring Greenacre, an existing residential development, will decline due to the externalities associated with industrial development. Conversely, if the homeowners in Greenacre are able to persuade the city council to downzone Blackacre to an “agricultural” classification, the market value of Blackacre will decline while Greenacre’s is enhanced. Most zoning amendment controversies are therefore three-sided, involving the directly affected landowner or developer, the city council, and the indirectly affected neighbors. The conflict arises because the directly and indirectly affected landowners who can be identified at the time of enactment will either suffer a “wipeout” or gather a “windfall.”²⁷

Second, the zoning amendment process differs from the legislative model in that a significant number of zoning amendment decisions are initiated by private land developers rather than by members of the city council or planning board. The developer petitions the council for a permissive rezoning of a particular and relatively small parcel of land. Official consideration of such requests tends to focus on the petitioner’s particular development project rather than on the overall planning needs and criteria of the community. It is difficult to believe that all of the judicial utterances

27. In these cases, it is generally the neighbors who will avail themselves of the direct legislation devices. Neighbors are either the potential beneficiaries of a restrictive zoning change or the self-perceived victims of a permissive amendment. In the first case, the initiative is likely to be used to achieve the desired benefit through the enactment of a restrictive amendment; this is sometimes described here as a “downzoning initiative.” The second situation usually arises where a landowner petitions the city council for a permissive amendment as a predicate to particular development project; in what sometimes is termed here a “permissive amendment referendum,” the referendum is used by neighbors to reverse a local governing board’s decision favorable to the prospective developer.

imaginable about "spot" or "contract" zoning can change this practical reality.²⁸

Zoning theory and reality diverge in other ways as well. Zoning and constitutional theory suggest that the properly enacted zoning ordinance will establish a class of permitted uses that are economically realistic for the given set of circumstances. There is evidence, however, that the practice of many suburban communities is to zone for the purpose of discouraging rather than permitting land development.²⁹ Many ordinances attempt to prevent development as of right by making official approval of development plans contingent upon particularized, discretionary decisions of the local governing body. Two mechanisms are readily available for this purpose. The first is the creation of zones in which relatively few uses are permitted as of right and in which intensive uses, such as apartment houses, are permitted only with a special use permit.³⁰ Then, if enabling legislation permits, the local governing board assumes control of the special use permit application process. This technique assures the local politicians of discretionary control over a significant portion of the land development process. The second technique, perhaps more widely used, is to place undeveloped land in zones that are euphemistically called "limited industrial" or "residential-agricultural,"³¹ but which actually are holding zones with use and specification requirements designed so that no economically motivated developer can afford to develop in the zone without obtaining a permissive use or specification amendment to the ordinance.³²

28. See generally 1 N. WILLIAMS, *supra* note 25, §§ 27.01-.08, 29.01-.04 (discusses "spot" and "contract" zoning). Of course, with good legal advice a city council can learn to avoid the external indicia of impermissible "spot" or "contract" zoning. For example, *Allred v. City of Raleigh*, 277 N.C. 530, 178 S.E.2d 432 (1971), can be read as suggesting that city councils should not keep detailed minutes or records of their consideration of amendments. An alternative and more sensible reading of *Allred* and other "spot" or "contract" zoning cases is, however, that city councils should make a record demonstrating that the legislators have considered appropriate factors in reviewing the zoning amendment proposal. It is possible that a formal process that forces recorded consideration of appropriate factors will have a beneficial impact on the subjective approach of individual legislators.

29. See D. MANDELKER, *supra* note 17, at 61-65 (1971); Krasnowiecki, *The Basic System of Land Use Control: Legislative Preregulation v. Administrative Discretion*, in *THE NEW ZONING: LEGAL, ADMINISTRATIVE, AND ECONOMIC CONCEPTS AND TECHNIQUES* 3, 6 (N. Marcus & M. Groves eds. 1970); Krasnowiecki, *Zoning Litigation and the New Pennsylvania Procedures*, 120 U. PA. L. REV. 1029, 1034-35 (1972).

30. See, e.g., *Humble Oil & Ref. Co. v. Board of Aldermen*, 284 N.C. 458, 461, 202 S.E.2d 129, 131 (1974) (ordinance permitted construction and operation of automobile service station only upon grant of special use permit).

31. See, e.g., *Forest City Enterprises, Inc. v. City of Eastlake*, 41 Ohio St. 2d 187, 324 N.E.2d 740 (1975), *rev'd*, 426 U.S. 668 (1976) (land zoned "light industrial" required zoning change to permit construction of high-rise apartment building).

32. See sources cited note 29 *supra*.

When applications for development permission are made in a special use permit context, the proceedings are generally characterized by reviewing courts as "quasi-judicial."³³ Even when elected officials make the decision, they are considered to be acting as administrators rather than as legislators. The result is that judicial review focuses upon the factfinding process; the question is whether the "administrators" made an appropriate decision in applying pre-established statutory standards to the facts on the record.

On the other hand, when a development proposal is presented to the governing board in the form of a petition for a zoning amendment, the local officials wear their "legislative" hats. Council members are cautioned not to consider the developer's plans to the exclusion of other planning considerations lest they be charged with "spot" or "contract" zoning. Despite legal theory, however, it is likely that the legislators considering a zoning amendment are ultimately asking the same question they would ask if the proceeding were for a special use permit: is the proposed development a reasonable and desirable addition to the community?

If the petition for a permissive amendment is denied, the developer seeking judicial review faces a heavy presumption of legislative validity.³⁴ Conversely, if the permissive amendment is enacted and neighbors bring a lawsuit charging unlawful "spot" or "contract" zoning, the same presumption of legislative validity will attach to the amendment that would have attached to its denial.³⁵ In either case, the focus in the courtroom changes

In his dissent in *Vickers v. Township Comm.*, 37 N.J. 232, 181 A.2d 129 (1962), Justice Hall said:

Most of the vacant land throughout the township is zoned for industrial use, although there is none now. This classification seems more a device to block further home construction on any large scale (as witness the provision permitting dwellings therein only with approval of the Board of Adjustment) than evidence of any real hope of filling with industry the areas so zoned.

Id. at 270, 181 A.2d at 150.

33. *E.g.*, *Humble Oil & Ref. Co. v. Board of Aldermen*, 284 N.C. 458, 469, 202 S.E.2d 129, 136 (1974).

34. The general understanding is that a developer has no right to a permissive amendment unless the original zoning designation is invalid. A successful challenge to the validity of the existing zoning ordinance requires a showing that the ordinance is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). *See generally* 1 R. ANDERSON, *AMERICAN LAW OF ZONING* § 3.23 (2d ed. 1976).

35. *See, e.g.*, *Kropf v. City of Sterling Heights*, 391 Mich. 139, 215 N.W.2d 179 (1974) (majority opinion); *Smith v. County of Washington*, 241 Or. 380, 406 P.2d 545 (1965) (suit by neighbors to enjoin permissive rezoning amendment); 1 A. RATHKOPF, *THE LAW OF ZONING AND PLANNING* 27-13 to 27-23 (3d ed. 1974); *cf.* *Kropf v. City of Sterling Heights*, 391 Mich. at 164, 215 N.W.2d at 190 (opinion of Levin, J., concurring); *Fasano v. Board of County Comm'rs*, 264 Or. 574, 507 P.2d 23 (1973).

from a legislative inquiry into the desirability of the proposed use to a judicial inquiry into the reasonableness of uses permitted under the current or amended zoning ordinance. Only rarely will state courts abandon or shift the presumption of legislative validity and engage in true judicial scrutiny of the adequacy and accuracy of the city council's factfinding process.³⁶

Thus, judicial review of zoning amendments often avoids the main issue—the reasonableness of the proposed development project in terms of the planning standards of the community. The difficulty lies in the traditional notion that the courts are reviewing exercises of “legislative” power and that separation of powers therefore dictates a passive judicial stance. Some courts are recognizing, however, that most zoning amendment disputes actually involve a conflict over a specific welfare transfer and that the zoning amendment process, although legislative in form, more closely resembles administrative action allocating government benefits among a closed class of particular persons.³⁷

The facts of the reported zoning initiative and referendum cases suggest that the direct legislation devices are usually used by voters who perceive themselves as potential losers in the conflict over a welfare transfer. There are three basic situations in which resort is made to direct legislation. The first involves the use of the initiative to effect a partial or systemic reform of a community's zoning administration.³⁸ For example, the zoning ordinance might be amended by initiative to require that certain types of planning criteria be considered explicitly by the council before an amendment is enacted. The second situation arises when voters use the initiative to impose use restrictions.³⁹ In these cases, the proponents of the initiative appear to be

36. *E.g.*, *Snyder v. City of Lakewood*, — Colo. —, 542 P.2d 371 (1975); *City of Louisville v. McDonald*, 470 S.W.2d 173 (Ky. 1971); *Fasano v. Board of County Comm'rs*, 264 Or. 574, 507 P.2d 23 (1973). See generally Bruff, *Judicial Review in Local Government Law: A Reappraisal*, 60 MINN. L. REV. 669 (1976); Cunningham, *Reflections on Stare Decisis in Michigan: The Rise and Fall of the "Rezoning as Administrative Act" Doctrine*, 75 MICH. L. REV. 983 (1977); Cunningham, *Rezoning by Amendment as an Administrative or Quasi-Judicial Act: The "New Look" in Michigan Zoning*, 73 MICH. L. REV. 1341 (1975); Sullivan, *Araby Revisited: The Evolving Concept of Procedural Due Process Before Land Use Regulatory Bodies*, 15 SANTA CLARA LAW. 50 (1974); Recent Development, *Developments in the Search for Workable Standards of Judicial Review of Piecemeal Rezoning*, 24 CATH. U.L. REV. 294 (1975); Comment, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130 (1972).

37. See note 36 and accompanying text *supra*.

38. *E.g.*, *Fletcher v. Porter*, 203 Cal. App. 2d 313, 21 Cal. Rptr. 452 (1962).

39. *E.g.*, *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976); *San Diego Bldg. Contractors Ass'n v. City Council*, 13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146 (1974), *appeal dismissed*, 427 U.S. 901 (1976).

using the process to effect a welfare transfer to themselves that the city council was unwilling to accomplish, perhaps because of the council's lack of responsiveness to environmental concerns in the community. In the third situation, the referendum is used to nullify an enacted amendment that would have permitted intensive development.⁴⁰ Here the proponents of the referendum appear to be employing direct legislation to prevent a welfare transfer from themselves to a developer.

The effect of using direct legislation in these contexts is to permit zoning amendment decisions to be made through the electoral process rather than through the somewhat cumbersome representative process mandated by the zoning enabling statutes. When faced with challenges to direct legislation, the courts must make the significant choice between the democratic values implicit in direct legislation and the goals of careful planning and individual fairness that are sought, if not always obtained, through the procedural and substantive requirements of zoning enabling legislation.

II. JUDICIAL LIMITATIONS ON DIRECT LEGISLATION IN ZONING: THE MAJOR ANALYTIC APPROACHES

Judicial determinations of the validity of the use of initiatives and referenda in adopting zoning amendments fall into two groups, differentiated by their predominant modes of analysis. The first group consists of opinions that compare the direct legislation devices with the pre-enactment procedural requirements of the zoning enabling statutes, and ask whether the use of direct legislation to make zoning decisions is consistent with those procedures.⁴¹ Some of these opinions are concerned primarily, and more narrow-

40. *E.g.*, *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976); *West v. City of Portage*, 392 Mich. 458, 221 N.W.2d 303 (1974) (Levin, J.).

41. *See, e.g.*, *City of Scottsdale v. Superior Court*, 103 Ariz. 204, 439 P.2d 290 (1968) (initiative in conflict with zoning procedures); *Johnston v. City of Claremont*, 49 Cal. 2d 826, 323 P.2d 71 (1958) (referendum not inconsistent with statutory zoning procedures), *disapproved by* *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 18 Cal. 3d 582, 596 n.14, 557 P.2d 473, 480 n.14, 135 Cal. Rptr. 41, 48 n.14 (1976); *Hurst v. City of Burlingame*, 207 Cal. 134, 277 P. 308 (1929) (initiative inconsistent with zoning procedures), *overruled by* *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 18 Cal. 3d at 596, 557 P.2d at 480, 135 Cal. Rptr. at 48; *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 41 Cal. App. 3d 677, 116 Cal. Rptr. 326 (1974) (initiative inconsistent with zoning procedures), *vacated*, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976); *Taschner v. City Council*, 31 Cal. App. 3d 48, 107 Cal. Rptr. 214 (1973) (initiative inconsistent with zoning procedures), *disapproved by* *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 18 Cal. 3d at 596 n.14, 557 P.2d at 480 n.14, 135 Cal. Rptr. at 48 n.14; *People's Lobby, Inc. v. Board of Supervisors*, 30 Cal. App. 3d 869, 106 Cal. Rptr. 666 (1973) (initiative inconsistent with zoning procedures), *disapproved by* *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 18 Cal. 3d at 596 n.14, 557 P.2d at 480 n.14, 135 Cal. Rptr. at 48 n.14; *Bayless v. Limber*, 26 Cal. App. 3d 463, 102 Cal. Rptr. 647

ly, with the fact that the direct legislation devices, particularly the initiative, do not provide the equivalent of the notice and hearing required by zoning enabling acts. Others are concerned with the broader question whether the use of direct legislation devices might yield results that are substantively inappropriate because inconsistent with the typical requirement that zoning ordinances be "in accordance with a comprehensive plan."⁴² These two approaches are here referred to collectively as the "compatibility analysis."

Opinions in the second group begin analysis with the commonly accepted proposition that the initiative and referendum are intended only for "legislative" decisionmaking.⁴³ The opinions then determine—usually without much discussion—whether there is a basis for ignoring the legislative form of the amendment and characterizing it as an "administrative" act.⁴⁴ If the amendment is characterized as "administrative," use of direct

(1972) (initiative not in conflict with zoning procedures applicable to charter city); *Fletcher v. Porter*, 203 Cal. App. 2d 313, 21 Cal. Rptr. 452 (1962) (initiative not inconsistent with zoning procedures applicable to charter city); *Laguna Beach Taxpayers' Ass'n v. City Council*, 187 Cal. App. 2d 412, 9 Cal. Rptr. 775 (1960) (initiative inconsistent with zoning procedures), *disapproved by Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 18 Cal. 3d at 596 n.14, 557 P.2d at 480 n.14, 135 Cal. Rptr. at 48 n.14; *City of Fort Collins v. Dooney*, 178 Colo. 25, 496 P.2d 316 (1972) (referendum not inconsistent with zoning procedures); *Korash v. City of Livonia*, 388 Mich. 737, 202 N.W.2d 803 (1972) (initiative incompatible with zoning procedures); *Elliot v. City of Clawson*, 21 Mich. App. 363, 175 N.W.2d 821 (1970) (referendum inconsistent with zoning procedures); *State ex rel. Wahlman v. Reim*, 445 S.W.2d 336 (Mo. 1969) (referendum on comprehensive ordinance not inconsistent with zoning procedures); *State ex rel. Powers v. Donohue*, 368 S.W.2d 432 (Mo. 1963) (alternative holding) (initiative inconsistent with zoning procedures); *Smith v. Township of Livingston*, 106 N.J. Super. 444, 256 A.2d 85, *aff'd*, 54 N.J. 525, 257 A.2d 698 (1969) (initiative inconsistent with zoning procedures); *Meridian Dev. Co. v. Edison Township*, 91 N.J. Super. 310, 220 A.2d 121 (1966) (initiative process supersedes inconsistent zoning procedures); *Elkind v. City of New Rochelle*, 5 Misc. 2d 296, 163 N.Y.S.2d 870 (Sup. Ct.), *aff'd*, 4 App. Div. 761, 165 N.Y.S.2d 709 (1957), *aff'd*, 5 N.Y.2d 836, 155 N.E.2d 404, 181 N.Y.S.2d 509 (1958) (referendum inconsistent with zoning procedures); *State ex rel. Hunzicker v. Pulliam*, 168 Okla. 632, 37 P.2d 417 (1934) (referendum not inconsistent with zoning procedures); *Hancock v. Rouse*, 437 S.W.2d 1 (Tex. Civ. App. 1969) (initiative and referendum inconsistent with zoning procedures); *Dewey v. Doxey-Layton Realty Co.*, 3 Utah 2d 1, 277 P.2d 805 (1954) (initiative inconsistent with zoning procedures).

42. See notes 24-25 and accompanying text *supra*.

43. See notes 125-27 and accompanying text *infra*.

44. See, e.g., *O'Meara v. City of Norwich*, 167 Conn. 579, 356 A.2d 906 (1975) (referendum held unavailable when city council acts as a zoning commission rather than in its general legislative capacity); *City of Coral Gables v. Carmichael*, 256 So. 2d 404 (Fla. Dist. Ct. App. 1972) (permissive rezoning held "legislative"); *West v. City of Portage*, 392 Mich. 458, 221 N.W.2d 303 (1974) (Levin, J.) (amendment rezoning 150 acres of land held "administrative"); *Denney v. City of Duluth*, 295 Minn. 22, 202 N.W.2d 892 (1972) (permissive rezoning of approximately 20 acres held "legislative"); *Kelley v. John*, 162 Neb. 319, 75 N.W.2d 713 (1956) (permissive rezoning held "administrative"); *Forman v. Eagle Thrifty Drugs & Markets, Inc.*, 89 Nev. 533, 516 P.2d 1234 (1973) (restrictive amendment to prohibit particular proposed use held "administrative"); *Hilltop Realty, Inc. v. City of South Euclid*, 110 Ohio App. 535, 164 N.E.2d 180 (1960) (permissive rezoning held "legislative"); *Bird v. Sorenson*, 16 Utah 2d 1, 394

legislation to effect its enactment is prohibited. The approach of these cases is here referred to as the "characterization analysis."

The classification of an opinion into one of these groups⁴⁵ is not a certain guide to the outcome of the litigation. In terms of their results, as distinct from their methods of analysis, the cases fall into three categories. Cases in the first category would permit, at least implicitly, the use of either the initiative or referendum in connection with zoning amendments; these decisions might be supported by either a compatibility or characterization approach.⁴⁶ The second category of decisions would permit use of the referendum but not the initiative;⁴⁷ these cases are most likely to be supported by a compatibility analysis. The third category of cases includes decisions holding that neither the initiative nor the referendum is available in connection with zoning amendments; these cases are usually supported by either a characterization analysis or the broader compatibility analysis that concerns itself with the requirement of comprehensiveness.⁴⁸

A. COMPATIBILITY ANALYSIS

1. *The California Decisions*

Any discussion of compatibility analysis should begin with *Hurst v. City of Burlingame*.⁴⁹ *Hurst* was the first in a line of decisions in California and other states holding that the initiative is incompatible with the zoning amendment process because it fails to comply with the statutorily required

P.2d 808 (1964) (permissive rezoning held "administrative"); *Leonard v. City of Bothell*, 87 Wash. 2d 847, 557 P.2d 1306 (1976) (rezoning 141-acre tract held quasi-judicial).

45. A case may fall into both the compatibility and characterization categories; a court that characterizes zoning decisionmaking as "legislative" may then proceed to a compatibility analysis. *See, e.g.*, *Bayless v. Limber*, 26 Cal. App. 3d 463, 102 Cal. Rptr. 647 (1972); *State ex rel. Hunzicker v. Pulliam*, 168 Okla. 632, 37 P.2d 417 (1934).

46. *See, e.g.*, *Bayless v. Limber*, 26 Cal. App. 3d 463, 102 Cal. Rptr. 647 (1972) (compatibility analysis) (initiative explicitly permitted); *Denney v. City of Duluth*, 295 Minn. 22, 202 N.W.2d 892 (1972) (characterization analysis) (referendum explicitly permitted).

47. *See, e.g.*, *Johnston v. City of Claremont*, 49 Cal. 2d 826, 323 P.2d 71 (1958) (compatibility analysis) (referendum permitted), *disapproved by Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 18 Cal. 3d 582, 596 n.14, 557 P.2d 473, 480 n.14, 135 Cal. Rptr. 41, 48 n.14 (1976); *Korash v. City of Livonia*, 388 Mich. 737, 202 N.W.2d 803 (1972) (compatibility analysis) (referendum permitted, but initiative prohibited).

48. *See, e.g.*, *West v. City of Portage*, 392 Mich. 458, 221 N.W.2d 303 (1974) (Levin, J.) (characterization analysis) (referendum not permitted); *Township of Sparta v. Spillane*, 125 N.J. Super. 519, 312 A.2d 154 (1973) (broad compatibility analysis) (referendum not permitted); *Hancock v. Rouse*, 437 S.W.2d 1 (Tex. Civ. App. 1969) (broad compatibility analysis) (neither referendum nor initiative permitted).

49. 207 Cal. 134, 277 P. 308 (1929), *overruled by Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 18 Cal. 3d 582, 596, 557 P.2d 473, 480, 135 Cal. Rptr. 41, 48 (1976).

pre-enactment hearing procedures, considered essential for the enactment of valid zoning ordinances.

The controversy in *Hurst* arose after the voters of Burlingame enacted a comprehensive zoning ordinance by initiative. According to the court, "factional differences" had developed in the city over the implementation of a zoning regime.⁵⁰ Each of two citizen groups prepared and presented to the city council a comprehensive zoning plan and an initiative petition. The city council declined to act on either plan and placed both proposed ordinances on the ballot. The ordinance adopted in the initiative election placed Hurst's land in an exclusively residential zone. Hurst objected and sued to invalidate the ordinance. The California Supreme Court agreed that the ordinance had been adopted improperly.⁵¹

The court based its decision on the principle that the scope of the local initiative is coextensive with the power of the local legislative body.⁵² The California Zoning Act of 1917 gave general-law cities such as Burlingame the power to enact comprehensive zoning ordinances, but required the local legislative body to hold a public hearing on a tentative zoning plan, develop a final plan, and, before enacting the final plan, hold yet another public hearing.⁵³ The court reasoned that the zoning power of the Burlingame city council was derived from the Zoning Act and was therefore circumscribed by the procedural requirements of the Act.⁵⁴

The court concluded that the Zoning Act's notice and hearing requirements should not be disregarded, and asserted that the requisite notice and hearing could not be met in an initiative election.⁵⁵ Therefore, the court held

50. *Id.* at 140, 277 P. at 311.

51. For 6 years prior to adoption of the ordinance, plaintiff had used his land as a storage yard for a lumber and building materials supply business. The lawsuit was brought when city officials threatened to enforce the exclusive residential zoning designation. *Id.* at 136-37, 277 P. at 310.

52. *Id.* at 140, 277 P. at 311.

53. Zoning Act of 1917, 1917 Cal. Stats. 1419, 1419-21.

54. According to the court: "[W]hen the method for the exercise of the power is prescribed by the statute such method is the measure of the power to act." 207 Cal. at 141, 277 P. at 311.

55. *Id.* It is somewhat surprising that the court did not make a greater effort to reconcile the initiative process with the notice and hearing requirements of the Zoning Act. A central principle of the law of direct legislation devices is that these powers should be broadly construed. *See* Comment, *The Scope of the Initiative and Referendum in California*, 54 CALIF. L. REV. 1717, 1724 & n.43 (1966). This would especially seem to be true in a state such as California where the powers of local initiative and referendum are reserved to the people in the state constitution. This interpretation was finally adopted by the court in *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 18 Cal. 3d 582, 594-96, 557 P.2d 473, 479-80, 135 Cal. Rptr. 41, 47-48 (1976).

If the *Hurst* court had perceived the function of the notice and hearing requirements to be

that “[t]he initiative law and the zoning law are hopelessly inconsistent and in conflict as to the manner of the preparation and adoption of a zoning ordinance.”⁵⁶ Faced with this conflict, the court concluded that the initiative—“general in its scope”—should be subordinated to the special and “particular” Zoning Act.⁵⁷

The court buttressed this statutory conflict rationale with a sentence suggesting a due process basis for its holding:

When the statute requires notice and hearing as to the possible effect of a zoning law upon property rights the action of the legislative body becomes *quasi* judicial in character and the statutory notice and hearing then becomes necessary in order to satisfy the requirements of due process and may not be dispensed with.⁵⁸

Hurst can therefore be read as resting upon two related bases for decision. The first is the statutory procedural limitation on city legislative power that was said to conflict with and override the general initiative process. The second is the circular argument that the notice and hearing requirements of the statute make the process “*quasi* judicial” and that this characterization triggers a due process requirement of notice and hearing.

that of providing the decisionmaker with access to facts and public opinion, it might have concluded that the election campaign in the initiative process would substantially accomplish that purpose. This would have been a reasonable means of accommodating the statutory requirements of notice and hearing with the constitutionally reserved power of the initiative.

The court chose, however, to characterize the notice and hearing requirements as having a constitutional dimension. See text accompanying note 58 *infra*. The conflict was perceived as being between two constitutionally mandated values, and the court chose to subordinate the right of initiative to the hearing and notice provisions that it said were required by due process.

Even this choice was not inevitable. The court might have concluded that, because judicial review of the *application* of a zoning ordinance to particular property was available to the landowner, the initiative process would not preclude an adjudicatory hearing prior to any permanent loss in property value.

Later, the California Court of Appeal strongly rejected the idea that an initiative election might serve as a substitute for the zoning pre-enactment procedures, but on different grounds. *Taschner v. City Council*, 31 Cal. App. 3d 48, 63-65, 107 Cal. Rptr. 214, 227 (1973), *disapproved* by *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 18 Cal. 3d 582, 596 n.14, 557 P.2d 473, 480 n.14, 135 Cal. Rptr. 41, 48 n.14 (1976); see text accompanying notes 73-74 *infra*.

56. 207 Cal. at 141, 277 P. at 311.

57. *Id.*

58. *Id.* Note that the court supported its due process argument with a characterization of the rezoning process as “*quasi* judicial.” Cases classified in this Article as “characterization” analysis opinions proceed from the “*quasi* judicial” characterization directly to a conclusion that direct legislation is improper because the initiative and referendum are reserved for “legislative” matters; reference to the absence of notice and hearing is not essential to this rationale. See notes 125-60 and accompanying text *infra*.

Later California cases involved litigants who sought to avoid the holding of *Hurst*. One of the most interesting of these cases is *Laguna Beach Taxpayers' Association v. City Council*.⁵⁹ Plaintiff, a citizen's group, sought a writ of mandate to compel city officials either to adopt certain ordinances or else to submit them to the voters in an initiative election. One of the ordinances would have required the city council to adopt an architectural policy; another would have prohibited the city planning commission from granting specification variances for the construction of buildings in excess of fifty feet in height.⁶⁰

Plaintiff attempted to distinguish *Hurst* by arguing that the proposed zoning ordinances were mere statements of general policy; implementation of the policy would require additional governmental action. Plaintiff argued that the city's power to articulate general policy was not limited by the "restrictive method of adoption" required for specific zoning ordinance changes.⁶¹ The thrust of plaintiff's argument was that the ordinance in *Hurst* not only stated policy, but also directly imposed use restrictions on land in the community.

Plaintiff claimed support for its position in the amended state zoning enabling act,⁶² which provided that "except as otherwise provided" in the zoning article, amendments to zoning ordinances could be initiated and adopted as are "other ordinances."⁶³ Presumably "other ordinances" could be adopted by initiative. The zoning article required any amendment that "imposes," "removes," or "modifies" a zoning regulation to be adopted only after the notice and hearing ordinarily required for the adoption of an original zoning ordinance.⁶⁴ On the face of these provisions, the *Hurst* notice and hearing rationale would not seem to apply to the proposed Laguna Beach amendments.⁶⁵

59. 187 Cal. App. 2d 412, 9 Cal. Rptr. 775 (1960), *disapproved by* Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore, 18 Cal. 3d 582, 596 n.14, 557 P.2d 473, 480 n.14, 135 Cal. Rptr. 41, 48 n.14 (1976).

60. *Id.* at 413, 9 Cal. Rptr. at 776.

61. *Id.* at 415, 9 Cal. Rptr. at 777.

62. *Id.* at 417-18, 9 Cal. Rptr. at 779; *see* notes 63-65 *infra*.

63. CAL. GOV'T CODE § 65807 (1953), *recodified at* CAL. GOV'T CODE § 65853 (West 1966).

64. CAL. GOV'T CODE § 65853 (West 1966).

65. *Hurst* depended upon the assertion that the power of the electorate in direct legislation was coextensive with the power of the city council, which was limited by the procedural requirements set forth in the statute. When *Hurst* was decided, the Zoning Act required a noticed hearing in connection with all zoning ordinance amendments. When *Laguna Beach* was decided, however, the notice and hearing requirements of the Zoning Act were limited to situations in which the amendment directly imposed, removed, or modified a land use regulation. *See* note 64 and accompanying text *supra*. Plaintiff argued that the proposed amendments in *Laguna Beach* were concerned with general policy and would not have directly imposed,

The court of appeal rejected plaintiff's arguments. The court said that the *implementation* of an architectural policy might involve the imposition of zoning regulations.⁶⁶ From this premise, the court concluded that an ordinance requiring the establishment of an architectural policy could be enacted only after notice and hearing.⁶⁷ The *Hurst* rationale would therefore prohibit enactment by initiative. As to the ordinance restricting the power of the planning commission to grant height variances, the court's response was abrupt. The proposed ordinance, it said, "regulates the height of buildings by prescribing a maximum height therefor."⁶⁸

Laguna Beach was wrongly decided. Neither of the proposed ordinances would have "imposed," "removed," or "inodified" a land use regulation. The restriction on variances did not prescribe a maximum height; that prescription was already contained in the zoning ordinance. Since the ordinance requiring formulation of an architectural policy did not directly affect any zoning regulation, there was no necessary incompatibility between the zoning statute and the initiative process. Nor did *Hurst* compel the court to bar the policy-oriented *Laguna Beach* initiatives since *Hurst* involved the initial adoption of a zoning ordinance that actually imposed land use regulations.

Laguna Beach therefore represents, at the least, a missed opportunity for a narrow and sensible reading of *Hurst*. At worst, the opinion is an unwarranted extension of *Hurst* in the face of new statutory language that seems to permit the use of the initiative for adopting prospective statements of policy not coupled to direct implementation.

In 1965, however, the California zoning laws were amended in a way that might have completely destroyed the statutory basis for *Hurst*.⁶⁹ The

removed, or modified existing rules regarding land use. The city council would therefore have been empowered to enact them without notice and hearing and, on the reasoning of *Hurst*, the initiative would not have been an incompatible means of enactment.

66. The court described the proposal as establishing "a policy that all future buildings in the city should conform to a type of architecture to be adopted and enforced through appropriate legislation." 187 Cal. App. 2d at 415, 9 Cal. Rptr. at 777-78.

67. The court stated that both the proposed architectural policy and the limitation on height variances "involve subjects of regulation" described in the Zoning Act and were therefore required to be enacted, if at all, only after pre-enactment notice and hearing. *Id.* at 418, 9 Cal. Rptr. at 779. The court's language—"involve subjects of regulation"—is significantly different from the language of then § 65804 of the Zoning Act—"imposes," "removes," "modifies." See note 64 and accompanying text *supra*. If read broadly, the *Laguna Beach* court's approach would preclude use of the initiative in enacting proposals dealing with any subject traditionally associated with zoning regulations, no matter how indirect the impact of the proposed legislation.

68. 187 Cal. App. 2d at 417, 9 Cal. Rptr. at 778.

69. See 1965 Cal. Stats. 4334, 4334-50.

1965 amendments did not change the requirement that amendments imposing, removing, or modifying zoning regulations be adopted after notice and hearing. Significantly, however, a section was added to the statute instructing courts not to invalidate zoning measures for procedural deficiencies not "prejudicial."⁷⁰ Other newly added language expressly stated the legislature's intention to provide "only a minimum of limitation" over local zoning matters.⁷¹

Subsequent to these amendments, the voters of Laguna Beach adopted a building height restriction by initiative. The affected landowners filed a lawsuit asserting that the amendment was invalid under *Hurst*. In *Taschner v. City Council*,⁷² the court of appeal invalidated the initiative in spite of the 1965 amendments⁷³ and breathed new life into *Hurst* by emphasizing its due process dictum.

The question before the court in *Taschner* was whether the initiative satisfied the requirement for notice and hearing and, if not, whether any defect was "prejudicial." The *Taschner* court's response differed from the *Hurst* court's narrow focus on the public hearing requirement; it specifically rejected the argument that the initiative might provide the substantial equivalent of the required zoning procedures. The court asserted that the amount and quality of debate found in the election process could not be equated with the "dispassionate study, evaluation and report" elicited by the required steps of normal zoning enactment.⁷⁴ The *Taschner* court also voiced its belief that the "legitimate claims" of affected landowners, perhaps a small percentage of the electorate, are better considered by the city legislative

70. CAL. GOV'T CODE § 65801 (West 1966) (enacted by 1965 Cal. Stats. 4334, 4346). The new section essentially provides that zoning decisions should not be judicially invalidated for procedural deficiencies unless the defect was prejudicial. No similar language appeared in the Zoning Act when the zoning ordinance at issue in *Hurst* was enacted. Although the 1965 amendments did not expressly address the availability of the initiative, § 65801 suggests that substantial compliance with the procedural requirements, including the notice and hearing requirements, is satisfactory. A court, therefore, might reasonably conclude that the characteristics of an election campaign bring about substantial compliance with the requirement for a public hearing, so that an initiative would not be in irreconcilable conflict with the zoning statute procedural requirements.

71. CAL. GOV'T CODE § 65800 (West 1966) (enacted by 1965 Cal. Stats. 4334, 4346) (amended by 1970 Cal. Stats. 3310, 3313).

72. 31 Cal. App. 3d 48, 107 Cal. Rptr. 214 (1973), *disapproved by* Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore, 18 Cal. 3d 582, 596 n.14, 557 P.2d 473, 480 n.14, 135 Cal. Rptr. 41, 48 n.14 (1976).

73. The *Taschner* court conceded that the effect of the 1965 amendments was that local zoning power derived not from the zoning statute, but from the broad grant of police power in the state constitution. See CAL. CONST. art. 11, § 7. The court, however, still interpreted the amended zoning statute as establishing minimum standards for zoning procedure. 31 Cal. App. 3d at 62-63, 107 Cal. Rptr. at 226-27.

74. *Id.* at 64, 107 Cal. Rptr. at 227.

bodies.⁷⁵ The opinion therefore states a broader basis for invalidating the use of the initiative than the *Hurst* compatibility rationale, which is based exclusively on the absence of a public hearing.

In 1974, the California Supreme Court disposed of the idea that *Hurst* was based on a due process rationale. In *San Diego Building Contractors Association v. City Council*,⁷⁶ the court was presented with an explicit procedural due process attack on an initiative adopting a building height restriction applicable to San Diego's coastal zone. Plaintiffs argued that, because the new ordinance applied only to a limited section of the city and placed a significant economic burden on the affected landowners, the action was adjudicative rather than legislative. Plaintiffs therefore claimed that the notice and hearing requirements of procedural due process were applicable and that, because the initiative process does not provide opportunity for formal hearings, the initiative was invalid.

The *San Diego* court rejected plaintiffs' arguments. The central proposition of Justice Tobriner's majority opinion is that due process does not require procedural safeguards for the enactment of legislation even though such safeguards are required for the adjudication of disputes.⁷⁷ Moreover, the due process language in *Hurst* was correctly viewed as dictum and expressly disapproved.⁷⁸

After *San Diego*'s rejection of the due process dictum in *Hurst*, the way was left open for a straightforward attack on *Hurst*'s statutory compatibility rationale. That attack was successfully made in *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*.⁷⁹ Livermore voters had adopted a growth control ordinance by initiative.⁸⁰ The trial court

75. *Id.*

76. 13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146 (1974), *appeal dismissed*, 427 U.S. 901 (1976).

77. *Id.* at 211, 529 P.2d at 573, 118 Cal. Rptr. at 149.

78. Justice Tobriner's opinion explained that:

[T]he *Hurst* decision rests exclusively on a matter of statutory interpretation; its holding does not rely on constitutional principles at all [The *Hurst* language] states only that notice and a hearing are necessary *when required by statute* and implicitly supports the constitutional principle reviewed above by suggesting rather clearly that when there is no such statutory requirement the adoption of a general zoning law remains a legislative act, as to which due process does not require notice and hearing.

Id. at 216, 529 P.2d at 576, 118 Cal. Rptr. at 152 (emphasis in original).

79. 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).

80. For a discussion of the background of this initiative and its attendant litigation, see Deutsch, *Land Use Growth Controls: A Case Study of San Jose and Livermore, California*, 15 SANTA CLARA LAW. 1 (1974).

The text of the Livermore initiative is set forth in the *Associated Home Builders* opinion. 18 Cal. 3d at 589 n.2, 557 P.2d at 476 n.2, 135 Cal. Rptr. at 44 n.2. The ordinance is crudely

invalidated the initiative on the authority of *Hurst*. The court of appeal affirmed in a rather confusing opinion that ultimately relied on the due process language of *Hurst*, although the court also held that the Livermore initiative was a "zoning ordinance" subject to the statutory pre-enactment procedures.⁸¹

When *Associated Home Builders* reached the California Supreme Court, only Justice Clark was unwilling to overrule *Hurst*.⁸² Justice Tobrin-er's majority opinion stated forthrightly that "*Hurst* . . . was incorrectly decided and is therefore overruled."⁸³ Justice Tobrin-er's approach is sim-

drawn. It would appear, however, to have the effect of directly implementing growth control by eliminating residences as permitted uses for a period of time necessary for the city to find solutions to such municipal problems as overcrowded schools, inadequate sewage facilities, and an insufficient water supply. *Id.* Although the ordinance did not expressly require that such problems be solved at all, it was held to be valid. *Cf. Golden v. Town Board*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972) (comprehensive zoning ordinance conditioning residential development upon the availability of adequate municipal facilities held valid).

81. 41 Cal. App. 3d 677, 116 Cal. Rptr. 326 (1974), *vacated*, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).

The court of appeal in *Associated Home Builders* relied upon both *Laguna Beach* and *Taschner*. *Laguna Beach* was cited for the proposition that the proposed Livermore growth control ordinance was in fact a "zoning ordinance" subject to the statutory notice and hearing requirements and, therefore, to the statutory conflict rationale of *Hurst*. This conclusion probably was correct because the Livermore ordinance did directly impose use restrictions. The court reached that conclusion, however, without independently analyzing either the Livermore ordinance or the *Laguna Beach* holding. The court relied on *People's Lobby, Inc. v. Board of Supervisors*, 30 Cal. App. 3d 869, 106 Cal. Rptr. 666 (1973), and *Scott v. City of Indian Wells*, 6 Cal. 3d 541, 492 P.2d 1137, 99 Cal. Rptr. 745 (1972), for the proposition that due process requires notice and hearing before the adoption of any measure interfering with land use. *San Diego*, decided after the court of appeal's decision in *Associated Home Builders*, rejected this proposition. *See* notes 76-78 and accompanying text *supra*.

82. Although Justice Mosk dissented, he agreed that "[t]he *Hurst* doctrine has long outlived its usefulness; it should no longer hobble the initiative process." 18 Cal. 3d. at 616, 557 P.2d at 493, 135 Cal. Rptr. at 61.

Because of many conceptual difficulties raised by *Hurst*, *see* note 98 *infra*, it had appeared as early as 1972 in the California Court of Appeal's decision in *Bayless v. Limber*, 26 Cal. App. 3d 463, 102 Cal. Rptr. 647 (1972), that *Hurst* might be of limited precedential value. The *Bayless* court indicated in a footnote that the 1965 enactment of Government Code § 65801 might have abrogated the statutory conflict rationale of *Hurst*. *Id.* at 469 n.5, 102 Cal. Rptr. at 650 n.5. That section provides, in essence, that zoning enactments should not be invalidated for nonprejudicial procedural defects. CAL. GOV'T CODE § 65801 (West 1966). *See generally* note 70 and accompanying text *supra*. The *Bayless* court also indirectly called into question the due process rationale of *Hurst* by holding that "the initiative process does not have to conform to the notice and hearing requirements which obtain when such ordinances are enacted by a city council." 26 Cal. App. 3d at 469, 102 Cal. Rptr. at 650. The California Supreme Court denied a petition for a hearing in *Bayless*. *Id.* at 470, 102 Cal. Rptr. at 651 (McComb, Peters, and Burke, JJ., dissenting). Thus, it is arguable that a majority of the supreme court approved of language in *Bayless* that was intended to limit *Hurst*.

83. 18 Cal. 3d at 596, 557 P.2d at 480, 135 Cal. Rptr. at 48.

ple: *Hurst* was wrong because the legislature never intended the zoning pre-enactment procedures to apply to zoning initiatives.⁸⁴ Moreover, Justice Tobriner stated that since the right to the initiative is guaranteed to the people by the state constitution, using the provisions of the state zoning law to bar use of the initiative might well be unconstitutional.⁸⁵ Justice Tobriner avoided that result by interpreting the zoning statute procedures as inapplicable to zoning initiatives.⁸⁶

The breadth of the court's holding in *Associated Home Builders* is surprising. By concluding that the California zoning procedures do not apply to initiative action,⁸⁷ and by suggesting that the legislature may not impose any limits on the use of the initiative in zoning ordinance enactment or amendment,⁸⁸ the court appears to have discarded the compatibility analysis as a doctrinal limitation on direct legislation in California zoning.

If the court had been willing to wrestle with the difficult question whether the Livermore initiative "imposes" zoning regulations,⁸⁹ however, it might have modified the *Hurst* incompatibility rationale to conform to the current zoning act, which requires pre-enactment notice and hearing only where the ordinance "imposes," "removes," or "modifies" a regulation.⁹⁰ Such a result would have retained the essence of *Hurst*'s concern for fairness in zoning by barring the use of direct legislation in enacting directly applicable zoning regulations, but would still have permitted direct legislation to be used in adopting zoning policy. As it stands, *Associated Home Builders* represents a judicial preference for the policies underlying direct legislation over the policies underlying the special zoning pre-enactment procedures. What is not clear is whether this preference is either desirable or required by the California Constitution.

84. The Legislature plainly drafted the questioned provisions of the zoning law with a view to ordinances adopted by vote of the city council; the provisions merely add certain additional procedural requirements to those already specified in Government Code sections 36931-36939 for the enactment of ordinances in general.

Id. at 594, 557 P.2d at 479, 135 Cal. Rptr. at 47.

85. *Id.* at 595, 557 P.2d at 479, 135 Cal. Rptr. at 47.

86. See note 84 and accompanying text *supra*.

87. 18 Cal. 3d at 594, 557 P.2d at 479, 135 Cal. Rptr. at 47.

88. *Id.* at 595, 557 P.2d at 480, 135 Cal. Rptr. at 48.

89. Because the Livermore ordinance imposes a moratorium on residential construction, see note 80 *supra*, it ought to be interpreted as "imposing" a use restriction on land where residential uses were previously permitted as of right. Because the restriction is not permanent, however, and because it has city-wide application, it could perhaps be argued that the Livermore ordinance constitutes a statement of zoning policy to which the notice and hearing requirements for ordinances "imposing" regulations are not applicable.

90. See notes 62-65 and accompanying text *supra*.

A major difficulty with the use of direct legislation to impose zoning regulations is that the electors are often either poorly informed or insufficiently sensitive to the competing policy considerations involved in imposing substantial economic burdens on a small number of landowners.⁹¹ Regardless of whether due process requires informed decisionmaking, permitting direct legislation when the electorate is not properly informed is inconsistent with the general desire for fairness implicit in the pre-enactment procedures of most zoning statutes, including that of California.

Such use of direct legislation is also inconsistent with the general tradition that direct legislation is reserved for the enactment of legislation.⁹² The California Constitution vests the "legislative power" of the state in the legislature, but reserves the powers of the initiative and referendum to the people.⁹³ The initiative is defined as "the power of the electors to propose statutes . . . and to adopt or reject them."⁹⁴ The referendum is defined as "the power of the electors to approve or reject statutes."⁹⁵ Thus, the direct legislation devices appear to be intended for use in "legislative" rather than "administrative" decisions. Nothing in *Associated Home Builders* forecloses the argument that the initiative and referendum should be unavailable where the zoning decision is characterized as "quasi-judicial" or "administrative";⁹⁶ moreover, such an approach to the problem is consistent with the California Constitution's initiative and referendum provisions.⁹⁷

Hurst should not be mourned, however. *Hurst's* lack of clarity had

91. Mr. Jonathan S. Paris of the *Stanford Law Review* conducted a survey of voters in Eastlake, Ohio regarding the referendum in *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976). See *Referenda in Rezoning*, *supra* note 10, at 829 n.62, 832 n.80. The questionnaire was distributed 4 years after the referendum; very few voters responded, and the survey is therefore inconclusive. The results, however, tend to support the proposition that a direct election campaign is not an adequate substitute for the public hearing required by zoning enabling legislation. Ninety percent of the respondents did not know the size of the parcel to be rezoned or the number of apartment units proposed for the project. *Id.* at 832 n.80. Although the project was to build housing for the elderly, 90% of the respondents either did not know whether the project would increase school population or thought the increase would be significant. *Id.* at 829 n.62. It is difficult to believe that the Eastlake City Council—which voted to rezone—was so ignorant, or that the interested voters would have been so ignorant if they had been present at a public hearing on the proposal.

92. See notes 125-29 and accompanying text *infra*.

93. CAL. CONST. art. 4, § 1 (1849, amended 1966).

94. *Id.* art. 2, § 8 (1849, amended 1976).

95. *Id.* art. 2, § 9 (1849, amended 1976).

96. This is the approach taken by courts employing the characterization analysis. See generally notes 43-44 and accompanying text *supra*; notes 125-29 and accompanying text *infra*.

97. Cf. *West v. City of Portage*, 392 Mich. 458, 221 N.W.2d 303 (1974) (Levin, J.) (limiting the use of direct legislation in Michigan to "legislative" matters on the basis of an evaluation of state constitutional and legislative history).

spawned a number of problems that had plagued the California courts.⁹⁸ By eliminating *Hurst*, the court has now fashioned a doctrine that arguably leaves open the possibility of limiting direct legislation in zoning through a characterization analysis.⁹⁹

2. *The Non-California Compatibility Opinions*

The demise of *Hurst* in California probably will have little impact on the development of compatibility theory in other states, even where courts have

98. One problem raised by *Hurst* is a possible distinction in the treatment to be accorded initiatives as opposed to referenda. In *Johnston v. City of Claremont*, 49 Cal. 2d 826, 323 P.2d 71 (1958), disapproved by *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 18 Cal. 3d 582, 596 n.14, 557 P.2d 473, 480 n.14, 135 Cal. Rptr. 41, 48 n.14 (1976), the California Supreme Court confirmed a suggestion made in *Hurst* that the initiative and referendum should be treated differently. *Johnston* involved an attack on the validity of a referendum; the *Johnston* court upheld the validity of the referendum because the procedural steps required for the enactment of zoning ordinances had been taken by the local legislative body prior to subjecting the ordinance to the referendum procedure. See 49 Cal. 2d at 836-37, 323 P.2d at 77. The court pointed out that the initiative is distinguishable from the referendum because an initiative is adopted without such compliance with the zoning statute procedures; the initiative in *Hurst* was void for that reason. *Id.* See text accompanying note 113 *infra*.

When considered from the standpoint of the quality of the zoning process, however, a distinction between the initiative and referendum is difficult to justify. The initiative and referendum both place the operative decisionmaking power in the hands of the electorate, some of whom stand to benefit from the resulting welfare transfer. Since interested neighbors may upset a zoning change approved by both the city council and the planning board, use of the referendum poses a significant threat to the comprehensiveness of the zoning process. See text accompanying notes 113-14 *infra*.

Hurst's rationale also permitted a dichotomy between general-law and charter cities that was intellectually unsatisfactory. Charter cities did not derive zoning power from the enabling act and thus were not subject to the procedural requirements of state law. See *San Diego Bldg. Contractors Ass'n v. City Council*, 13 Cal. 3d 205, 216, 529 P.2d 570, 576, 118 Cal. Rptr. 146, 152 (1974), appeal dismissed, 427 U.S. 901 (1976). This distinction is difficult to justify, however, if, as the *Hurst* due process dictum suggests, the policy underlying the incompatibility limitation is the protection of individuals' rights to notice and hearing. Certainly those rights are important regardless of whether the affected landowner resides in a charter or a general-law city.

Moreover, *Hurst's* reliance on the language and purpose of the Zoning Act left its rationale vulnerable to amendments to the Act. See generally notes 69-75 and accompanying text *supra*. Reliance on the statute also resulted in pressure to apply *Hurst's* doctrinal limitation in situations where the protection of the rights of individuals by notice and hearing is inapposite; this difficulty arose because the Zoning Act at the time of *Hurst* did not distinguish between different types of zoning amendments. An example of such pressure is *Laguna Beach*, where an initiative that arguably would not have restricted individuals' rights by directly imposing land use regulations was nevertheless disallowed. See notes 59-68 and accompanying text *supra*. *Fletcher v. Porter*, 203 Cal. App. 2d 213, 21 Cal. Rptr. 452 (1962), is a more sensitive response to the statutory language although the Zoning Act is not directly applicable because the city, Palo Alto, is a charter city. *Fletcher* upheld an initiative to redefine the duties of the city planning commission with regard to adoption of a master plan. Justice Tobriner, sitting by designation in *Fletcher*, distinguished *Laguna Beach* on the ground that "the ordinance here does not provide for future permanent zoning but establishes a temporary protection against interim changes in zoning." 203 Cal. App. 2d at 324, 21 Cal. Rptr. at 458.

99. See notes 96-97 and accompanying text *supra*.

explicitly followed *Hurst*.¹⁰⁰ Some courts that followed *Hurst* at one time have now rejected its approach in favor of a characterization analysis.¹⁰¹ Other courts that purport to follow *Hurst* actually articulate their opinions in terms of a broader compatibility approach that differs markedly from *Hurst*'s narrow focus on the notice and hearing questions.

*City of Scottsdale v. Superior Court*¹⁰² is a good example of an opinion that cites *Hurst* but that ultimately uses a broader compatibility analysis. In *Scottsdale*, the Arizona Supreme Court held that the initiative is not available to voters who seek to overturn a permissive amendment adopted by the city council.¹⁰³ The court stated that the power to zone had been delegated by the legislature exclusively to the "governing body of the city."¹⁰⁴ The court then cited the "well-established general rule" that when the legislature makes a grant of power and prescribes the manner of its exercise, the power must not be exercised otherwise than as prescribed.¹⁰⁵ Because both the state zoning statute and the city ordinance required a public hearing for the enactment of zoning amendments, the initiative process is not a permissible means of enacting such amendments. The opinion suggests that the initiative violates due process in this context by not providing a hearing.¹⁰⁶

The Arizona court's citations in support of this conclusion suggest, however, that due process might be offended not by the lack of a hearing, as in *Hurst*, but by the city council's abdication of its delegated power to make zoning amendments.¹⁰⁷ Implicit in the *Scottsdale* court's opinion is the

100. *Hurst* has frequently been cited by courts refusing to allow direct legislation in the zoning context. See, e.g., *City of Scottsdale v. Superior Court*, 103 Ariz. 204, 439 P.2d 290 (1968); *Korash v. City of Livonia*, 388 Mich. 737, 202 N.W.2d 803 (1972); *Smith v. Township of Livingston*, 106 N.J. Super. 444, 256 A.2d 85, *aff'd per curiam*, 54 N.J. 525, 257 A.2d 698 (1969); *Hancock v. Rouse*, 437 S.W.2d 1 (Tex. Civ. App. 1969); *Dewey v. Doxey-Layton Realty Co.*, 3 Utah 2d 1, 277 P.2d 805 (1954).

101. Compare *West v. City of Portage*, 392 Mich. 458, 221 N.W.2d 303 (1974) (Levin, J.) and *Bird v. Sorenson*, 16 Utah 2d 1, 394 P.2d 808 (1964) with *Korash v. City of Livonia*, 388 Mich. 737, 202 N.W.2d 803 (1972) and *Dewey v. Doxey-Layton Realty Co.*, 3 Utah 2d 1, 277 P.2d 805 (1954). For a discussion of characterization analysis, see notes 43-44 *supra*; notes 125-29 *infra*.

102. 103 Ariz. 204, 439 P.2d 290 (1968).

103. *Id.* at 207, 439 P.2d at 293.

104. *Id.*

105. *Id.*

106. *Id.*

107. The court cited *Eubank v. City of Richmond*, 226 U.S. 137 (1912), and *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928). These cases disallowed delegation of municipal decisionmaking power to a city's citizens. The Arizona Court's opinion is somewhat curious, however, since it does not discuss the application of either *Eubank* or *Roberge* to the facts of the case. *Hurst* is cited, but *Hurst* itself cited neither *Eubank* nor *Roberge*; further, the *Hurst* language does not indicate a concern for problems of delegation of power to citizens

notion that the legislature's delegation of the power to zone to the governing body of the city was intended to be exclusive. While *Hurst* focused upon the procedural protections afforded the landowner by a notice and hearing requirement, this exclusive delegation approach emphasizes the power of the pre-enactment procedures to promote comprehensive and reasoned planning implementation by the governing body of the city.¹⁰⁸

Hancock v. Rouse,¹⁰⁹ a Texas opinion, illustrates the appeal the exclusive delegation approach has for some state courts. Plaintiffs sought to compel the submission of a downzoning initiative to the voters. The court noted that the statute granted zoning power to the "local legislative body."¹¹⁰ This language would seem to support use of the initiative if the "legislative power" is shared by the electors and the representative governing body. The court pointed out, however, that the statute required: (1) that zoning be in accordance with a "comprehensive plan," (2) that both the city council and a specialized zoning commission be involved in the process, (3) that public hearings be held before both the zoning commission and the city council, and (4) that the interests of affected neighbors be protected by requirement of receipt of actual notice of the proposed amendments and by imposition of a three-fourths majority vote requirement on the city council upon presentation of the neighbors' protest petition.¹¹¹

The *Hancock* court concluded that these special procedures reflected a legislative intention that zoning decisions be something more than a series of *ad hoc* political choices. It emphasized that the intelligent preparation and adoption of a comprehensive zoning ordinance requires "careful study," detailed informational input, and the advice of experienced professionals. The court expressed its belief that the electoral process cannot provide an adequate substitute for the procedural steps required by the zoning statute.¹¹²

Both *Scottsdale* and *Hancock* suggest that a more important question than whether the initiative conflicts with the zoning notice and hearing requirements is whether some zoning decisions are inherently unsuited to plebiscite decisionmaking. This question of suitability is most directly presented in the compatibility analysis cases dealing with referenda. Some of these cases simply avoid the issue by concluding that the compatibility

except to the extent that delegation to the electorate results in failure to provide notice and hearing.

108. The exclusive delegation approach is similar to the broader compatibility analysis used in *Taschner*. See notes 72-75 and accompanying text *supra*.

109. 437 S.W.2d 1 (Tex. Civ. App. 1969).

110. *Id.* at 3.

111. *Id.*

112. *Id.* at 4.

doctrine of *Hurst* only examines the relationship between direct legislation and the pre-enactment zoning procedures; the referendum is said to be a post-enactment procedure to which pre-enactment procedures simply do not apply.¹¹³

If the problem is considered from the standpoint of the quality of the zoning process rather than from the perspective of protecting the affected landowner's rights, however, differences between the referendum and the initiative become less compelling. Both the initiative and referendum remove the operative decisionmaking power from the governing body and planning board and place it instead into the hands of the electorate—some of whom will be beneficiaries of the resulting welfare transfer. Moreover, use of the referendum permits the interested neighbors to upset a zoning change that has been approved by the planning board and possibly by an extraordinary majority of the governing board. Thus, the use of the referendum on permissive rezoning may pose a significant threat to the comprehensiveness of the zoning process.

This concern with the quality of zoning decisions is reflected in some of the zoning referendum cases. In *Township of Sparta v. Spillane*,¹¹⁴ the Appellate Division of the New Jersey Superior Court considered actions by two municipalities seeking a declaratory judgment that the referendum was inapplicable to permissive zoning amendments. The New Jersey court recognized that the competing values involved were the comprehensiveness of zoning planned and adopted by experienced city officials versus the benefits of wider public participation in the management of municipal affairs.¹¹⁵

The *Spillane* court's examination of New Jersey precedent convinced it that the philosophy of comprehensive zoning should prevail over that of direct public participation.¹¹⁶ The court noted that effective, comprehensive zoning requires consideration of a variety of social, economic, and geographic factors in connection with the present and future needs of the

113. *E.g.*, *Johnston v. City of Claremont*, 49 Cal. 2d 826, 323 P.2d 71 (1958), *disapproved* by *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 18 Cal. 3d 582, 596 n.14, 557 P.2d 473, 480 n.14, 135 Cal. Rptr. 41, 48 n.14 (1976). *See* note 98 *supra*.

114. 125 N.J. Super. 519, 312 A.2d 154 (1973).

115. *Id.* at 524, 312 A.2d at 156.

116. Zoning is intended to be accomplished in accordance with a comprehensive plan and should reflect both present and prospective needs of the community. [citations omitted] Among other things, the social, economic and physical characteristics of the community should be considered. The achievement of these goals might well be jeopardized by piecemeal attacks on the zoning ordinances if referenda were permissible for review of any amendment.

Id. at 525-26, 312 A.2d at 157.

community. Although not explicit in the opinion, it is a fair inference that the court found this consideration of factors—and the inevitable balancing of interests—to be beyond the capacity of the electorate in referenda on specific issues: “Sporadic attacks on a municipality’s comprehensive plan would tend to fragment zoning without any overriding concept.”¹¹⁷

Cynics or realists might scoff at the suggestion that a typical municipal governing body regulates in terms of any “overriding concept” other than expediency or parochialism. The *Spillane* court recognized, however, that “governing bodies may not always have acted in the best interest of the public and may not, in every case, have demonstrated the expertise which they might be expected to develop.”¹¹⁸ The important point here is that the direct legislation cure may be worse than the disease. At least the caprice of a city council can be made amenable to effective judicial review; the whimsy of a voting public may be exceptionally difficult to monitor.¹¹⁹

In *Elkind v. City of New Rochelle*,¹²⁰ a New York court refused to permit a referendum to be used for a zoning ordinance amendment. The court argued that the comprehensiveness of a well-considered zoning plan might be destroyed if certain provisions could be rejected through the referendum. The *Elkind* court specifically expressed its fear that “[e]ssential uses, such as for churches and schools, could be barred from the municipalities.”¹²¹

117. *Id.* at 526, 312 A.2d at 157.

In 1976, the New Jersey legislature adopted a statute prohibiting referenda or initiatives on zoning ordinances or amendments. N.J. STAT. ANN. § 40:55 D-62 (West Cum. Supp. 1976). This statute reflects the legislature’s preference for the result in *Spillane* and *Smith v. Township of Livingston*, 106 N.J. Super. 444, 256 A.2d 85, *aff’d*, 54 N.J. 525, 257 A.2d 698 (1969) (initiative inconsistent with zoning procedures), over that of an earlier opinion, *Meridian Dev. Co. v. Edison Township*, 91 N.J. Super. 310, 220 A.2d 121 (1966) (initiative process supersedes inconsistent zoning procedures).

118. 125 N.J. Super. at 526, 312 A.2d at 157.

119. City council decisions on small-area rezonings can be made susceptible to meaningful judicial review. This can be accomplished by requiring that the record reveal consideration of appropriate factors, *see, e.g.*, *Allred v. City of Raleigh*, 277 N.C. 530, 178 S.E.2d 432 (1970), or by treating small-area rezonings as “administrative” matters subject to more intensive judicial review of the factfinding process, *see, e.g.*, *Fasano v. Board of County Comm’rs*, 264 Or. 574, 507 P.2d 23 (1973). *See also* Booth, *A Realistic Reexamination of Rezoning Procedure: The Complementary Requirements of Due Process and Judicial Review*, 10 GA. L. REV. 753 (1976). On the other hand, it is difficult to conceive of a way in which judicial review of a direct legislation election could effectively ascertain the quality of decisionmaking except by determining whether the petitions triggering the election were valid and whether the proponents of the initiative or referendum had complied with applicable state law regarding publicity.

120. 5 Misc. 2d 296, 163 N.Y.S.2d 870 (Sup. Ct.), *aff’d*, 4 App. Div. 761, 165 N.Y.S.2d 709 (1957), *aff’d*, 5 N.Y.2d 836, 155 N.E.2d 404, 181 N.Y.S.2d 509 (1958).

121. 5 Misc. 2d at 301, 163 N.Y.S.2d at 877.

On the surface, the result in *Elkind* appears questionable. The proposed amendment would have added an "Office Building District" to the zoning plan as a "floating zone." As such, it arguably represented both a policy decision to use zoning as an incentive to attract businesses to the community and a decision to require carefully tailored plans subject to governing board approval at the map amendment stage. On the one hand, this appears to be the type of decision that requires careful consideration and analysis of various economic, social, geographic, and political factors in terms of the application of a long range plan to specific land; according to cases such as *Spillane* and *Hancock*, this type of decision should be reserved for the official city decisionmaking agencies. On the other hand, the decision presented by the *Elkind* floating zone ordinance is also one of general public policy that would be appropriate for direct legislation. Significantly, it is this type of zoning ordinance amendment that by definition is not subject to the neighborhood-protest extraordinary-majority requirement;¹²² this suggests that such an amendment is similar to nonzoning ordinance proposals that, of course, are subject to the referendum.

Perhaps, however, the result in *Elkind* can be explained through a better understanding of the underlying fact situation. The lawsuit challenging the referendum was brought by an owner of vacant land that, according to the court, would qualify for reclassification under the terms of the amendment.¹²³ It is possible that the court implicitly recognized that the referendum was not called to test public opinion on a major policy question, but was instead responsive to a specific project proposed for particular land in the city. Under these circumstances, the referendum proponents may have been seeking a decision that was based not on policy or legislative facts, but on facts of particular application.

This analysis of *Elkind*, although strained on the basis of the few facts available in the opinion, is consistent with the idea that the values of "comprehensive" planning in zoning cannot comfortably coexist with the values of the direct legislation devices unless the standard for limiting the use of direct legislation is the character of the factual determinations involved in the amendment. There seems to be no reason to say that electors are incompetent to answer the question, "Should New Rochelle seek to

122. Many zoning statutes provide a procedure for protest by those who own land within a defined perimeter of the land directly affected by a map amendment. See note 23 and accompanying text *supra*. Because the original legislative creation of a "floating zone" does not involve any particular land, such a protest procedure would be inapplicable. The neighborhood protest procedure will generally be available, however, when the floating zone is "brought to earth" in a map amendment.

123. 5 Misc. 2d at 297, 163 N.Y.S.2d at 872.

attract office buildings?" To conclude that respect for expertise and comprehensiveness dictates exclusive delegation of such questions to the city governing body is to invest that political body and its creature, the planning commission, with qualities of wisdom that experience suggests are not available in large quantities. Such a conclusion also overlooks the fact that use of the direct legislation devices does not preclude efforts of public education by the "expert" bodies; indeed, in the case of a referendum, the electoral process will follow public hearings and formal enactment of the measure by the governing board. In short, there are few characteristics of such a general policy question that make it unfit for plebiscite decision-making.

Suppose, however, that the question for decision is, "Should Elkind's land be rezoned to permit construction of office buildings?" or, to be more realistic but less lawful, "should New Rochelle authorities permit Elkind to construct his proposed office building?" This decision requires different types of factual inquiry. An intelligent decision requires careful assessment of the externalities likely to be associated with Elkind's proposal, the relationship between those externalities and existing or proposed patterns of land use in both the neighborhood and the larger community, and the social and economic benefits likely to be derived from the project. Such a decision, concerned with particular facts—predictive to be sure, but often ascertainable on the basis of comparable historical data—may not be made as well by the voting public as by the official city decisionmakers. This conclusion is not based on the assumption that official decisionmakers are intrinsically more "expert" than voters, but rather on the perception that the regular zoning decisionmaking process is better adapted *or adaptable* to this type of factfinding than is the electoral process. This type of particularized decision, no matter what its form, is more akin to an "administrative" permit application decision than to a "legislative" decision.

The distinction between questions of general policy and questions of the particular application of general policy is crucial to the development of doctrine in this area if the values of direct legislation are to be meaningfully accommodated with the values of fair and reasoned decisionmaking underlying typical zoning statutory schemes. Such a distinction is suggested by section 65853 of the California Government Code. That statute requires that ordinances imposing, removing, or modifying regulations be enacted in accordance with typical zoning procedures, while other amendments to a zoning ordinance may be enacted as all other ordinances are adopted, including, presumably, by means of initiative and subject to referendum.¹²⁴

124. See notes 62-65 and accompanying text *supra*.

Although this statutory distinction may be irrelevant in California after *Associated Home Builders*, the underlying principle of distinguishing types of zoning amendment decisions on the basis of the required factual analysis may explain opinions such as *Taschner* that limit the use of direct legislation by virtue of a compatibility theory articulated in terms of the required "expertise" of the official public bodies that have a mandate to implement "comprehensive" planning. This principle is articulated more directly, however, in the cases that limit the use of direct legislation in zoning on the basis of a characterization analysis.

B. CHARACTERIZATION ANALYSIS

The rule that direct legislation devices may be applied to "legislative" but not to "administrative" matters is derived by some courts from constitutional or statutory text.¹²⁵ Other courts base the rule on state constitutional history, which indicates that the direct legislation devices are intended for questions of major policy, but not for questions of detail.¹²⁶ Still other courts base the rule on a fear that, if applied to "administrative" activities, the initiative and referendum will be used to harass and interfere with the orderly operation of government.¹²⁷

Underlying this dichotomy in the zoning cases that disapprove the use of direct legislation is a judgment that major questions of zoning policy are suitable for plebiscite decisionmaking, while regulatory questions requiring assessment of particular facts are not suited to resolution by election. Decisions requiring particularized factfinding are also likely to be those in which due process requires the affected persons to be given a meaningful opportunity to be heard,¹²⁸ which arguably is not available in an election contest.¹²⁹

125. See, e.g., *Kelley v. John*, 162 Neb. 319, 321, 75 N.W.2d 713, 715 (1956); Comment, *Zoning by Initiative to Satisfy Local Electorates: A Valid Approach In California?*, 10 CAL. W.L. REV. 105, 121 (1975). In such cases, attention is paid to words such as "laws," "statutes," and "ordinances."

126. See, e.g., *West v. City of Portage*, 392 Mich. 458, 462-63, 221 N.W.2d 303, 304-05 (1974).

127. See, e.g., *Kelley v. John*, 162 Neb. 319, 323-24, 75 N.W.2d 713, 716 (1956); Trautman, *Initiative and Referendum in Washington: A Survey*, 49 WASH. L. REV. 55, 86 (1973) (discussing *Durocher v. King County*, 80 Wash. 2d 139, 492 P.2d 547 (1972), in which the grant of an unclassified use permit was considered an administrative act not subject to referendum).

128. See 1 K. DAVIS, *ADMINISTRATIVE LAW TEXT* § 7.03, at 161-62 (3d ed. 1972). Compare *Londoner v. Denver*, 210 U.S. 373 (1908) with *Bi-Metallic Inv. Co. v. Board of Equalization*, 239 U.S. 441 (1915).

129. The California Supreme Court's opinion in *San Diego*, which held that procedural due process did not apply to the adoption of "legislation" by initiative, see notes 76-78 and accompanying text *supra*, precluded a majority of the supreme court from determining whether the electoral process might constitute an adequate substitute for a more traditional due process

Application of the administrative-legislative distinction to zoning amendments requires courts to look through form to substance. An amendment is formally an act of legislation.¹³⁰ Some courts have been unable or unwilling to look beyond this form to find an "administrative" substance. These courts conclude that, because the enactment of the original comprehensive zoning ordinance is a legislative act, any amendment to that ordinance must also be legislative.¹³¹ Courts have also been persuaded that, if the essence of legislation is the adoption of a prospective rule of conduct, rezonings that impose rules governing the future use of land must necessarily be legislative.¹³²

Although some courts have adhered to the "legislative" label in deciding zoning initiative and referendum disputes,¹³³ several courts have characterized rezonings as "administrative." In *Kelley v. John*,¹³⁴ an action to enjoin a referendum on a permissive amendment, the court stated that the test for distinguishing legislative from administrative matters is whether the government is "making a law"—legislative—or "executing or administering" laws already in existence—administrative.¹³⁵ According to this definition, it might appear that most rezonings are "legislative," because such

hearing. The dissenters held that the initiative election campaign would not sufficiently fulfill the constitutional requirement. In *Taschner*, the California Court of Appeal held that an election campaign is not sufficient to satisfy procedural due process requirements. See notes 72-75 and accompanying text *supra*. In *Hancock*, a Texas court stated that a hearing cannot be "meaningful" unless it is held before the body authorized to act, and that only the city governing body was authorized to act on zoning amendments. See notes 109-12 and accompanying text *supra*.

Due process might, however, require a hearing that is considerably less formal than the typical adjudicative hearing. There is a suggestion in Justice Rehnquist's majority opinion in *United States v. Florida E. Coast Ry. Co.*, 410 U.S. 224 (1973), that in connection with "proceedings for the purpose of promulgating policy-type rules or standards," due process will require no more than the notice and hearing associated with "informal" rulemaking by the federal regulatory agencies. *Id.* at 245; see *id.* at 240-46. Thus, in connection with a general downzoning initiative such as that in *San Diego*, an election campaign might be constitutionally satisfactory. Nevertheless, this approach still might not suffice in a dispute about a small-area rezoning that more closely resembles an adjudicative process.

130. See note 17 and accompanying text *supra*.

131. See, e.g., *Dwyer v. City Council*, 200 Cal. 505, 253 P. 932 (1927); *City of Coral Gables v. Carmichael*, 256 So. 2d 404, 408 (Fla. Dist. Ct. App. 1972).

132. See, e.g., *Hilltop Realty, Inc. v. City of South Euclid*, 110 Ohio App. 535, 538, 164 N.E.2d 180, 182, *appeal dismissed*, 170 Ohio St. 585, 166 N.E.2d 924 (1960).

133. See, e.g., *Dwyer v. City Council*, 200 Cal. 505, 253 P. 932 (1927); *City of Fort Collins v. Dooney*, 178 Colo. 25, 496 P.2d 316 (1972); *City of Coral Gables v. Carmichael*, 256 So. 2d 404 (Fla. Dist. Ct. App. 1972); *Denney v. City of Duluth*, 295 Minn. 22, 202 N.W.2d 892 (1972); *Hilltop Realty, Inc. v. City of South Euclid*, 110 Ohio App. 535, 164 N.E.2d 180, *appeal dismissed*, 170 Ohio St. 585, 166 N.E.2d 924 (1960).

134. 162 Neb. 319, 75 N.W.2d 713 (1956).

135. *Id.* at 321, 75 N.W.2d at 715.

amendments usually declare new rules of conduct.¹³⁶ In *Kelley*, however, the court simply asserted that changes in the classification of particular parcels of land are part of the "administration" of the general zoning ordinance.¹³⁷

In *Forman v. Eagle Thrifty Drugs & Markets, Inc.*,¹³⁸ the Nevada Supreme Court held that neither the initiative nor the referendum is available in connection with particularized zoning decisionmaking. In addressing the issue of the referendum, the court's rationale was similar to that of *Kelley*: changes in the zoning scheme are "administrative" because subjecting such matters to direct legislation would risk destroying the "uniformity necessary to the accomplishment of the purposes of the comprehensive zoning ordinance" ¹³⁹

One of the most recent characterization analysis opinions is that of Michigan Supreme Court Justice Levin in *West v. City of Portage*.¹⁴⁰ Portage was incorporated in 1963. In 1965 the city council adopted a comprehensive zoning ordinance; between 1965 and early 1974 the council amended the ordinance 128 times.¹⁴¹ The 1974 litigation challenged a referendum on an amendment rezoning 150 acres of land to permit a planned unit development.

Three of the seven members of the Michigan court held the referendum generally available in connection with rezonings, but found the particular

136. This reasoning may be too superficial. Reclassification amendments usually result from a petition for relief by a landowner or developer who wishes to complete a development project precluded by existing regulations. The rezoning decision is made with knowledge of the project that probably will be undertaken when the rules are changed. Thus, a decision to rezone is not a decision to change rules in the abstract, but a decision to provide relief from existing rules to permit particular, identified conduct. Although the form of this decision is the adoption of general rules for the land in question, the substance of the decision is the approval of particular activity.

137. The court stated:

The policy of the municipality was determined by the adoption of the comprehensive zoning ordinance. The administration of the ordinance, including the changes in classification of particular pieces of property, very rarely affects all the electors of a municipality. To say that administrative determinations are subject to referendum could defeat the very purposes of zoning. The uniformity required in the proper administration of a zoning ordinance could be wholly destroyed by referendum. . . . It would permit the electors . . . to change, delay, and defeat the real purpose of the comprehensive zoning ordinance by creating the chaotic situation such ordinance was designed to prevent.

162 Neb. at 323-24, 75 N.W.2d at 716.

138. 89 Nev. 533, 516 P.2d 1234 (1973).

139. *Id.* at 538, 516 P.2d at 1237. The reasoning of *Kelley* and *Forman* is substantially similar to that of the broader compatibility cases such as *Taschner*. See text accompanying notes 72-75, 102-17 *supra*.

140. 392 Mich. 458, 221 N.W.2d 303 (1974).

141. *Id.* at 471, 221 N.W.2d at 309.

referendum petition involved in *West* to be improper.¹⁴² These judges used a narrow compatibility analysis reminiscent of the California Supreme Court in *Johnston v. City of Claremont*:¹⁴³ the referendum is not inconsistent with zoning pre-enactment procedures because those procedures are followed in the enactment of the ordinance prior to calling the referendum.¹⁴⁴

Justice Levin wrote an opinion in which two of his colleagues joined, a third joining in the result but not in the opinion.¹⁴⁵ The opinion first

142. This position was set forth in a concurring opinion written by Justice Williams in which Justices T.M. Kavanagh and Swainson joined. Justice Williams' opinion found the *West* referendum improper because the petition for the referendum also sought an initiative to rezone 80 of the 150 acres. *Id.* at 473, 221 N.W.2d at 310. The electors therefore sought not only to reject the permissive amendment, but also the enactment of new regulations. Thus, even though the concurring judges would have held a true referendum to be available on a permissive rezoning, they were forced by Michigan precedent to hold that the "city clerk could not legally, on the basis of the instant petition, put the requested referendum to the people." *Id.* at 478, 221 N.W.2d at 313.

143. 49 Cal. 2d 826, 323 P.2d 71 (1958), *disapproved by* Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore, 18 Cal. 3d 582, 596 n.14, 557 P.2d 473, 480 n.14, 135 Cal. Rptr. 41, 48 n.14 (1976); *see note 98 supra*.

144. 392 Mich. at 473-77, 221 N.W.2d at 310-12. The concurring opinion stated:

The aim of referendum is retention of the status quo existing prior to legislative adoption of the amendatory zoning ordinance. The status quo was, again, achieved through compliance with the statutory zoning enactment procedures. As a result, referendum's aim of retention of the status quo does not conflict with the zoning-enabling act's aim of guaranteeing certain procedural steps prior to the passage of *new* zoning legislation.

Id. at 476, 221 N.W.2d at 312 (emphasis in original).

This is an attractive syllogism. Judges such as Justice Levin view it as unrealistic, however, because it fails to recognize that the issue before both the governing body as it rezones and the voters in the referendum is not the retention of the status quo per se, but whether to permit or reject a change in regulations that will lead to the development of the land according to an identified set of plans. From this perspective the referendum is not a decision favoring the status quo, but is instead a decision against a particular development proposal. Thus, the voters' return to the status quo is only incidental to a decision to reject the proposed development. From the standpoint of the developer, the decision is a new zoning decision and not simply a continuation of existing regulations.

145. Justice Levin's opinion in *West* is based on his concurring opinion in *Kropf v. City of Sterling Heights*, 391 Mich. 139, 215 N.W.2d 179 (1974). In *Kropf*, the Michigan Supreme Court reviewed a city council's refusal to rezone to permit multi-family development. The landowner-developer sought a declaration that the existing single-family residential zoning was constitutional. The majority treated the case in traditional terms; the court asked whether the single-family residential classification was reasonable by inquiring whether some use might be made of the land for the permitted purposes, and by independently considering whether the local legislature's decision to exclude multi-family residences was arbitrary. *Id.* at 159-61, 215 N.W.2d at 187-89.

On its majority opinion alone, *Kropf* would be little more than another example of traditionally deferential judicial review of zoning. Justice Levin's concurrence, however, objected to the entire analysis adopted by his colleagues. Justice Levin asserted that zoning decisionmaking is an administrative rather than a legislative process. He argued that decisions based on broad grounds or general facts are legislative, while those based on individual grounds or specific facts are administrative. *Id.* at 164, 166-67, 215 N.W.2d at 190, 190-92. He then

overruled *McKinley v. City of Fraser*,¹⁴⁶ a 1962 opinion holding that the initiative is available for administrative as well as for legislative acts. Justice Levin concluded that *McKinley* was wrong because the court did not properly consider the meaning of the words "initiative" and "referendum" in their historical context,¹⁴⁷ and therefore failed to recognize that those devices were intended only for matters "truly legislative in character."¹⁴⁸

The second stage in Justice Levin's analysis was to establish that "a zoning amendment affecting particular property is an administrative, not a legislative, act."¹⁴⁹ In support of this proposition, Justice Levin cited not only other direct legislation cases, but also cases characterizing rezoning as "administrative" in other contexts.¹⁵⁰

The supreme courts of Connecticut and Washington have also recently used characterization analysis in holding that referenda are unavailable for rezoning decisions. Although the Connecticut Supreme Court held in *O'Meara v. City of Norwich*¹⁵¹ that zoning power had been vested exclusively in the city council,¹⁵² the court also stated that, in making zoning decisions, the city council acts as a zoning commission and not in its general

described the typical zoning ordinance as a "specific" enactment that represents particularized decisions. *Id.* at 167, 215 N.W.2d at 191-92.

Justice Levin's conclusion that the rezoning process is "administrative" became important when the court considered the zoning referendum in *West*. Justice Levin's analysis in *West* proceeds from the premise that tract rezoning is "administrative" to the conclusion that zoning is not a fit subject for direct legislation.

For a thorough discussion of the status of Justice Levin's views in the Michigan Supreme Court, see Cunningham, *Reflections on Stare Decisis in Michigan: The Rise and Fall of the "Rezoning as Administrative Act" Doctrine*, 75 MICH. L. REV. 983 (1977); Cunningham, *Rezoning by Amendment as an Administrative or Quasi-Judicial Act: The "New Look" in Michigan Zoning*, 73 MICH. L. REV. 1341 (1975).

146. 366 Mich. 104, 114 N.W.2d 341 (1962).

147. 392 Mich. at 461-62, 221 N.W.2d at 304.

148. *Id.* at 466, 221 N.W.2d at 306.

149. *Id.* at 468, 221 N.W.2d at 308. Justice Levin's conclusion that small-area rezonings are administrative in nature is not surprising in view of his description of the zoning process in *Kropf*:

The time has come . . . to cast aside old slogans and catchwords. For most communities, zoning as long range planning based on generalized legislative facts without regard to the individual facts has proved to be a theoretician's dream, soon dissolved in a series of zoning map amendments, exceptions and variances—reflecting, generally, decisions made on individual grounds—brought about by unanticipated and often unforeseeable events

391 Mich. at 168, 215 N.W.2d at 191-92. See generally note 145 *supra*.

150. 392 Mich. at 468-72, 221 N.W.2d at 308-10.

151. 167 Conn. 579, 356 A.2d 906 (1975).

152. *Id.* at 583, 356 A.2d at 908. This rationale is similar to the exclusive-delegation approach used in *Scottsdale* and *Hancock*. See notes 102-12 and accompanying text *supra*.

legislative capacity.¹⁵³ In *Leonard v. City of Bothell*,¹⁵⁴ the Washington Supreme Court held that referenda are limited to legislative matters and that the rezoning of a 141-acre tract was a quasi-judicial action.

The most interesting aspects of *O'Meara* and *Leonard* are the policy justifications expressed by the courts. Echoing some of the compatibility opinions,¹⁵⁵ the *O'Meara* court stated that the zoning enactment procedures are intended to assure that a zoning decision has been "fully and fairly considered and is truly dictated by the public interest."¹⁵⁶ Moreover, the court noted that the procedures are designed to protect the rights of individual property owners.¹⁵⁷ In *Leonard*, the Washington court asserted that "[a]mendments to the zoning code or rezone decisions require an informed and intelligent choice by individuals who possess the expertise to consider the total economic, social, and physical characteristics of the community."¹⁵⁸ Implicit in these arguments, of course, is the idea that direct legislation cannot provide either intelligent or fair zoning decisionmaking. It is this fundamental notion that zoning decisions differ from typical legislative decisions and therefore require special procedures that lies at the heart of both the characterization analysis opinions and the broader compatibility cases that reject the use of direct legislation.

Characterization analysis has some real virtues: it does not depend upon the vagaries of statutory draftsmanship or the changing standards of due process law;¹⁵⁹ it applies to both the initiative and the referendum; and it purports to distinguish between policy formulation and policy implementation. Unfortunately, none of the characterization opinions provides an ade-

153. 167 Conn. at 583, 356 A.2d at 909.

154. 87 Wash. 2d 847, 557 P.2d 1306 (1976).

155. See notes 49-124 and accompanying text *supra*.

156. 167 Conn. at 583, 356 A.2d at 908.

157. *Id.*

158. 87 Wash. 2d at 854, 557 P.2d at 1311.

159. There is some danger that the United States Supreme Court decision in *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976), will be read as establishing a due process entitlement to the use of direct legislation; such a reading would, however, be erroneous. See note 16 *supra*. In *Eastlake*, a permissive zoning amendment sought by a developer was rejected in a referendum. Although the developer could have attacked the referendum on the basis of a characterization analysis, the developer relied instead upon a due process limitation on the delegation of zoning power to the electorate. On the authority of Washington *ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928), *Thomas Cusack Co. v. Chicago*, 242 U.S. 526 (1917), and *Eubank v. City of Richmond*, 226 U.S. 137 (1912), the Ohio Supreme Court upheld the developer's constitutional argument. 426 U.S. at 671-72. The United States Supreme Court found the Ohio court's reliance upon these cases to be misplaced, however, *id.* at 677-78, and reversed the Ohio court's decision. *Id.* at 672. Nevertheless, because the Supreme Court's due process discussion was somewhat limited to these rather outdated cases, *Eastlake* does not foreclose all due process objections to direct legislation. Moreover, *Eastlake* certainly does not affect the validity of the use of characterization analysis.

quate articulation of the circumstances that give rise under state law to the characterization of a zoning amendment decision as "administrative." Thus, the major weakness of characterization analysis is that no court has yet taken the opportunity carefully to define the situations in which the analysis should be applied.

Nevertheless, some guidance can be drawn from the facts and results of the characterization analysis cases. Each of the cases holding that direct legislation is unavailable involved a small scale permissive or restrictive rezoning.¹⁶⁰ Apparently the courts are responsive to the idea that small scale rezonings require the application of stated or unstated policy criteria to particularized and specific decisions, rather than the formulation of general policy applicable to the community at large.

III. AN EVALUATION OF THE STATE LAW DOCTRINES

Judicial opinions resolving local government law issues too often substitute labels or formalistic reasoning for analysis. This characteristic is particularly evident in opinions restricting the use of direct legislation in zoning; it may partially be explained by the sheer difficulty of writing opinions declaring that voters may not make a decision about zoning—a matter perceived by them to be well within their competence.¹⁶¹ In disputes such as these, deeply held democratic values, coupled with a popular and not unreasonable fear of local government incompetence or corruption, compete with the less widely understood values of coherent and reasoned decisionmaking that are among the goals of most zoning procedures.

The tendency to decide these cases on the basis of artificial rationales has had unfortunate effects. Some courts have unnecessarily restricted the use of the initiative.¹⁶² Other courts have applied the narrow compatibility

160. *Leonard v. City of Bothell*, 87 Wash. 2d 847, 557 P.2d 1306 (1976), involved the rezoning of a 141-acre tract. *West v. City of Portage*, 392 Mich. 458, 221 N.W.2d 303 (1974), involved the permissive rezoning of a 150-acre tract. *Forman v. Eagle Thrifty Drugs & Markets, Inc.*, 89 Nev. 533, 516 P.2d 1234 (1973), involved the permissive rezoning of a 3.5 acre tract of land; the court's holding extended both to the referendum and to an initiative that, although general in form, apparently was stimulated by the development proposal in question. *Bird v. Sorenson*, 16 Utah 2d 1, 394 P.2d 808 (1964), involved a referendum on a permissive rezoning. The size of the tract is not indicated in the opinion. It appears from the opinion, however, that the owner of the land had given a purchase option to intervenors in the lawsuit. It is a fair inference that exercise of the option was contingent on rezoning and that the optionees had a particular development scheme in mind. In *Kelley v. John*, 162 Neb. 319, 75 N.W.2d 713 (1956), the permissive amendment involved "Block 3, Kelley's Hilltop Addition to the City of McCook, Nebraska." *Id.* at 320, 75 N.W.2d at 714.

161. See note 1 *supra*.

162. See, e.g., *Laguna Beach Taxpayers' Ass'n v. City Council*, 187 Cal. App. 2d 412, 9 Cal. Rptr. 775 (1960).

analysis derived from *Hurst* to permit referenda in tract rezoning situations where the necessity for and desirability of plebiscite decisionmaking are questionable.¹⁶³ Some courts using a characterization approach have blindly adhered to the "legislative" form of the amendment, permitting direct legislation in equally questionable contexts.¹⁶⁴

Because land use regulation problems will continue to generate public concern and pressure for direct public participation, more satisfactory judicial approaches to accommodating the values of comprehensive zoning with those of direct legislation should be developed.¹⁶⁵ Rules governing the resolution of these disputes should be reasonably certain in their application and appropriately sensitive to the competing values.

The compatibility analysis is unsatisfactory in that it is both overinclusive and underinclusive. Focusing upon the statutory pre-enactment procedures too rigidly limits the use of the initiative in proposing amendments to zoning ordinances because the pre-enactment procedures of the typical zoning statute do not distinguish between different types of zoning amendments. Under the compatibility analysis, however, those procedures will even prevent using the initiative to propose zoning amendments that are essentially statements of general public policy and as to which the pre-enactment procedures probably are not needed. Focusing upon the pre-enactment procedures also prevents intelligent consideration of the problems presented by the referendum, a postenactment process. Here, the narrow compatibility analysis found in *Hurst* mechanically permits referenda in a context in which direct legislation may unnecessarily destroy attempts to achieve coherent and fair zoning decisionmaking.

Even the broader compatibility analysis opinions—such as *Hancock*—that are not so closely tied to the pre-enactment notice and hearing procedures give too much attention to the statutory structure of the zoning process

163. See, e.g., *Johnston v. City of Claremont*, 49 Cal. 2d 826, 323 P.2d 71 (1958). Presumably *Johnston's* rationale is now superseded by that of *Associated Home Builders*. See notes 79-88 and accompanying text *supra*.

164. See notes 132-33 and accompanying text *supra*.

165. New Jersey now has a statute prohibiting direct legislation in connection with zoning ordinance enactment or amendment. See note 117 *supra*. One suggestion for statutory treatment of the problem of direct legislation in zoning may be found in Comment, *supra* note 125, at 128-30. The proposed statute appears too cumbersome, however, and takes the *Hurst* narrow-compatibility approach too seriously. The primary purpose of the proposal is to provide mechanisms for notice and hearing; the proposal was drafted, however, prior to the *San Diego* opinion.

Although the thrust of the discussion that follows in the text is devoted to judicial solutions to these disputes, the set of rules suggested in the text accompanying notes 166-70 *infra* might easily be reformulated in statutory form.

and too little attention to characteristics of various types of zoning amendments that might be relevant to the effective use of direct legislation. These opinions refer to the values of comprehensive planning without analyzing how those values are affected by the use of direct legislation in connection with the particular amendment before the court.

The rationales articulated in the characterization analysis opinions are little better. These opinions attempt to solve the problem through the application of a deceptively simple rule, but make little or no attempt to identify and consider factors that properly characterize a zoning decision as "legislative" or "administrative." Instead, these labels become little more than talismans for packaged results.

Although the results in many cases that prevent direct legislation in tract-rezoning situations are correct, the characterization rationale probably has reduced the number of such correct results. Judges are understandably conscious that labels attached in one legal context are likely to be used in other contexts without independent analysis. For example, to label a rezoning situation "administrative" is to resolve the direct legislation question against the use of direct legislation. Attaching the "administrative" label to rezoning in the direct legislation context, however, might result in the automatic use of that label to determine whether procedural due process or the presumption of legislative validity should attach to such amendments. Although the "administrative" label might be appropriate in all of these contexts, such a judgment should be based on independent consideration of the factors involved in each case.

Judicial assessment of disputes over the use of direct legislation in connection with zoning amendments must be made with reference to two goals. The first is to ensure that zoning decisions are made intelligently and fairly. The second is to maximize citizen participation in government decisionmaking through the initiative and referendum processes. Where the achievement of both goals is impossible, judges must make a choice, which frankly is a value choice, between the traditional zoning procedures and direct legislation.

Most courts have resolved this choice in favor of the zoning procedures and have then attempted to articulate a rationale for the choice in terms of some rule of construction or through the application of labels. The general tendency of the courts to hesitate in permitting direct legislation in the zoning amendment process seems to be the proper value choice in the absence of a statutory or constitutional command to the contrary. The theoretical basis for this choice is a preference for fairness in the process of altering the rights and privileges of individual landowners. Fairness requires

informed and reasoned decisionmaking; in respect to some zoning amendment decisions, there is reason to believe that the direct legislation procedures do not provide adequate assurances of intelligent and fair decisions. The historical basis for this choice is that traditional zoning procedures reflect a built-in accommodation of both general public opinion and the more intense view of the immediately affected "local" public. When coupled with the regular representative electoral process and judicial review, the traditional zoning process provides reasonable opportunity for public participation in nearly all zoning amendment situations.

Effective as well as politically acceptable implementation of this value choice requires that direct legislation devices be precluded where the zoning issue has characteristics that suggest that the statutory devices attempting to ensure intelligence and fairness are substantially implicated and find no analogous substitute in direct legislation. Perhaps the easiest application of such an approach is in connection with the enactment of an ordinance that does no more than state community policy without providing for its immediate implementation. Examples are ordinances instructing city officials to develop an architectural control policy, a growth management policy, or a plan for regulating the height of buildings. Such ordinances might technically become amendments to the existing zoning ordinance and, as such, their enactment would be subject to the statutory notice and hearing procedures. It should be noted, however, that such amendments by their very nature would not call into play any statutory neighborhood protest procedure because they would not implement regulations with respect to particular land.¹⁶⁶ Presumably, the intensity of citizen interest in such a proposal would not vary on the basis of the direct or indirect effect of the regulation. Additionally, any comprehensive-plan requirements of the statute would be irrelevant because such ordinances would not immediately change the zoning map or regulations. Public hearings would be useful in providing the lawmakers with adequate exposure to relevant fact and opinion; nevertheless, enactment of these ordinances is unlikely to require findings or assessments of particularized, historical facts for which trial-type hearings might be appropriate. Instead, ordinances such as these are likely to be enacted on the basis of value judgments based on impressions of the overall operation of the city planning and regulatory process. These value determinations are typical of purely legislative decisions, which traditionally have been subject to direct legislation.

Tract or small-area rezoning decisions are quite different. These ordinances are the most numerous type of zoning amendments and are among

166. See note 122 *supra*.

those that generate the most intense public concern. In these decisions, zoning pre-enactment procedures are quite important; here, direct legislation poses significant threats to values of intelligence and fairness.

The essential characteristic of a tract or small-area rezoning is that the decision directly imposes, removes, or modifies regulations in the context of a particular development proposal.¹⁶⁷ This has three consequences. The first is that any such decision involves a question of fidelity to the comprehensive plan, and thus calls upon the "expertise" of the local planning agency and governing body.¹⁶⁸ The second is that an intelligent decisionmaker must have command of the facts related to the particular situation: What is the nature of the land in question? How do the present proposed regulations affect the land use patterns and land values of the neighborhood? What are the externalities associated with the newly permitted or restricted use? The third consequence is that, because these are particularized and localized implementation decisions, identified welfare transfers are unavoidable. Within the area of the amendment's direct and indirect effects the intensity of public concern is likely to be great, while interest in other sections of the community may be minimal or nonexistent.

In such cases, an intelligent decision would seem to require a factfinding and assessment process by persons who have developed some expertise and who are conversant with the less obvious implications of the decision for the community's overall planning effort. To the extent that particularized facts are relevant, a somewhat formal hearing process would seem to be essential to provide the basis for both intelligent decisionmaking and concomitant fairness to those affected by the decision.¹⁶⁹ Fairness also suggests the desirability of a final decision by the representative governing body, which not only has the capacity to account for the varying intensities of public opinion, but which also is required by many zoning statutes to be responsive to the expressed concerns of the immediate neighbors.

These characteristics of a small-area rezoning suggest that plebiscite decisionmaking may not yield intelligent decisions and may result in decisions that are unfair to the affected landowners. It seems unlikely that an

167. These verbs are used in California Government Code § 65853. See notes 62-65 and accompanying text *supra*.

168. The "expertise" referred to is developed through *experience* in dealing with community problems in the exercise of public responsibility, not through cocktail party conversation or purely formal training.

169. Judicial utterances in some of the cases suggest that a hearing must either be entirely adjudicative or entirely legislative. There is no reason, however, why a public hearing cannot be conducted to include a factfinding component in addition to a component that emphasizes opportunities for expression of general public information and opinion.

electoral campaign for an initiative or referendum regarding such an ordinance will yield a sufficiently certain public understanding of the facts underlying the proposal or an appreciation of the impact of the change on the overall community planning effort.¹⁷⁰ Moreover, to the extent that a small-scale rezoning has an appreciable negative impact on the value of identifiable parcels of land, fairness would suggest the desirability of a factfinding process that either approximates an adjudicative decision or is at least amenable to a form of judicial review based on a record. If direct legislation is used to effect or prevent a small-area rezoning, many of the decisionmaking voters are likely to have an intense interest—based partly on economics—in the outcome; the specific beneficiaries of a welfare transfer may be in a position to force the transfer.

Finally, small-scale rezoning decisions are hardly the type of governmental decision for which the direct legislation devices were designed. These rezonings rarely involve statements of general public policy; such decisions implement rather than declare policy, and often do so in a context where the citizens most directly affected are accorded special rights of participation in the representative decisionmaking process. On balance, the small-scale rezoning decision appears to be one in which a choice should be made against the use of the direct legislation devices; a contrary result threatens important societal values without a significant countervailing benefit.

The most difficult case to assess is the zoning ordinance enactment that imposes, relieves, or modifies land use regulations, but does so with respect to such a large class of situations that it can also fairly be said to represent a significant statement of general public policy. Examples are the adoption of the comprehensive zoning ordinance in *Hurst* and the coastal-zone height restriction in *San Diego*. There is little doubt that direct legislation would be appropriate if the questions were “Should Burlingame have comprehensive zoning?” or “Should San Diego restrict intensive development in its coastal area?” When such questions involve the actual implementation of the broader policy, however, a choice in favor of direct legislation becomes less obvious.

In the evaluation of cases in this context, it is useful to remember that the political values inherent in direct legislation can be achieved, albeit

170. Note, *supra* note 7, is a useful discussion of the operation of direct legislation at the state level. The author discusses the problem of voter understanding with reference to the complexity of many initiative measures and the nature of the political campaigns waged in favor of initiatives. *Id.* at 934-39. It seems unlikely that local initiative measures and political campaigns will yield greater public understanding than is provided by state initiative processes. See note 91 *supra*.

much less directly, through the regular political process; representatives can be defeated for re-election and ordinances can be repealed.¹⁷¹ Moreover, where zoning implementation decisions are made by the electorate without consideration by the planning board and without the public hearing process that helps the decisionmaker evaluate fact and opinion, the damage may be more difficult to repair. This is most likely in situations where the relevant rules make repeal of an initiative ordinance impossible without another initiative.

Although the choice is difficult, the appropriate result may be to preclude use of the initiative in these cases on the ground that zoning implementation decisions are more likely to be rational and fair if made through the traditional "official" processes. Where the question is one of public pressure for the enactment of legislation, this pressure can be accommodated through the normal processes of representative government.

This attempt to resolve the question without resorting to formalism does not rely upon requirements of procedural due process. Thus, the initiative is inappropriate in cases such as *San Diego* even where it is not precluded by procedural due process. Because this approach is not tied to any external concept such as due process, "administrative" or "legislative" characterizations, or the presence of certain zoning statute procedures, it may be thought to be too flexible and thus insufficiently useful to guide local officials and attorneys in planning and counseling. In essence, however, the resulting rule is simply that the initiative and referendum should not be permitted where the immediate impact of the zoning amendment is the imposition, removal, or modification of regulations.

171. Of course here is the rub. Failure to adopt a restrictive ordinance by initiative or to invalidate a permissive amendment by referendum will likely result in actual land development—unwanted by the proponents of the direct legislation; and once the development occurs, certain rights will vest. It is, therefore, not entirely satisfactory to contend that the regular representative processes will solve the problems of the "no-growth" advocates. The greatest difficulty of course arises in cases where a permissive amendment is sought and granted for a particular development project. But it is in these cases that the typical zoning procedures adopt a workable compromise: public opinion can be expressed at one or more hearings, and the intense opinion of neighboring landowners is accommodated through an extraordinary majority requirement.